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961345 FEB 21 1997
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Petitioner,

v.

LINDA ELDREDGE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Civil Procedure 19 requires joinder of employers, who have sole hiring authority, in a Title VII action where the substance of the complaint is that the only named defendant, a joint labor-management apprenticeship committee, has discriminated against women by leaving selection and hiring of beginning apprentices up to the employers.

2. Whether an affirmative action program with an arbitrary numerical quota of 20% female participation in an apprenticeship program may be imposed where its achievement depends entirely on the acts of absent parties not bound by the court order, including employers and unions, and where the quota bears no relation to the proportion of female applicants for jobs in the carpentry trade.

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PETITION FOR A WRIT OF CERTIORARI

The Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The previous published opinions in this case are reported at:

- 440 F.Supp. 506 (N.D.Cal. 1977) (*Eldredge I*)[1] (App. 96a-133a);

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[1] For clarity's sake, the designation of opinions as *Eldredge I, II,* and so forth in this petition follows the Ninth Circuit's usage in its most recent opinion, referred to here as *Eldredge VI.*

- 83 F.R.D. 136 (N.D.Cal. 1979) (App. 87a-95a);
- 662 F.2d 534 (9th Cir. 1981) (*Eldredge II*) (App. 29a-37a);
- 459 U.S. 917 (1982) (denial of certiorari, Rehnquist, J. dissenting) (App. 80a-86a);
- 51 Fair Empl. Prac. Cas. (BNA) 149 (N.D. Cal. 1985) (*Eldredge III*) (App. 76a-79a);
- 883 F.2d 1334 (9th Cir. 1987) (*Eldredge IV*) (App. 14a-28a);
- 487 U.S. 1210 (1988) (denial of certiorari) (App. 75a); and
- 94 F.3d 1366 (9th Cir. 1996) (*Eldredge VI*) (App. 1a-13a).

The district court order from which the most recent Ninth Circuit appeal was taken is unpublished, No. C-75 2062-JPV (N.D.Cal. Sept. 9, 1993) (*Eldredge V*) (App. 55a-74a), as is the District Court's recent interim order implementing relief, No. C-75-2062-CAL (N.D. Cal. Jan. 17, 1997) (App. 38a-54a).

JURISDICTION

The Court of Appeals entered its judgment on September 8, 1996. The Court of Appeals denied a timely petition for rehearing on October 25, 1996. App. 134a-135a. The Supreme Court granted a 30-day extension for the filing of this petition on January 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE OF CIVIL PROCEDURE AND STATUTORY PROVISIONS INVOLVED

The relevant Federal Rule of Civil Procedure is F.R.C.P. 19(a) & (b), reproduced as Appendix D.

The relevant statutory provisions are 42 U.S.C. §§ 2000e-2(d),(j), & (k) and 2000e-5(g)(1), reproduced as Appendix E.

STATEMENT OF THE CASE

This case presents important questions of law affecting the future enforcement of Title VII of the Civil Rights Act of 1964 in the context of joint union- and management-sponsored apprenticeship programs. It raises sharply the issue of how effective relief in such cases may be fashioned when neither the unions nor employers affected are joined as parties and the complaint, stripped to its essence, is that the absent employers have engaged in discrimination. The Court is asked to address two questions: are the employers "parties to be joined if feasible" under Rule 19, Federal Rules of Civil Procedure, and does Title VII permit a court to impose an affirmative action remedy with an arbitrary numerical quota of 20% female participation in the apprenticeship program where achievement of the quota would require action by absent parties and the quota itself bears no relation to the proportion of female applicants for jobs in the carpentry trade.

In September 1975, Linda Eldredge brought this class action against the Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee ("JATC"), alleging that the JATC, by permitting employers to select their own beginning apprentices, had engaged in a discriminatory employment practice that had a disparate impact upon female applicants. The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The District Court set out the facts in detail in its first opinion, *Eldredge I*. *See* App. 98a-107a.

The JATC is a joint labor-management committee that administers the carpentry apprenticeship program for union apprentices in Northern California. The trust agreement that created the JATC empowers and requires it to establish and maintain programs for training apprentices to ensure an adequate supply of skilled labor for the employers who fund it. The JATC administers the apprenticeship program for the unions and employers signa-

tory to the Carpenters 46 Northern California Counties Master Agreement ("Master Agreement" or "Agreement").[2]

The Master Agreement contains a number of provisions which affect the hiring of apprentices. See ER 377-401, Pltf.'s Tr. Exh. 3. Under the Master Agreement, employers must hire one apprentice for every five journey-level carpenters hired. The Master Agreement establishes a union-run referral system from which employers can obtain journey-level and apprentice carpenters as needed. Employers may call up some of their employees by name. The rest are dispatched in numerical order from out-of-work lists maintained by the unions. The employers retain the unconditional right to refuse to hire any carpenter, journey-level or apprentice, dispatched by the unions, and the employers may dismiss new hires without cause in their first three days of employment. Under the Agreement, the unions have no power to compel an employer to hire any particular individual; an employer may reject any referral without cause.

Apprentices undergo four years of classroom instruction and also receive on-the-job training from their employers. Under the indenture process adopted by the JATC in 1974 and used until 1991, applicants could become indentured apprentices, eligible for classroom instruction and dispatch by a local union, in one of two ways. First, they could sign up at a local JATC office to obtain a place on a referral list. Employers could call the local office, which would refer to them the applicant at the top of the list. Under the collective bargaining agreement, the employers retained the right to reject referred applicants along with any other referrals "for any reason." If the employer hired the referred applicant, he or she would

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[2] When this lawsuit began there were two collective bargaining agreements, referred to as the "Master Agreements" in some of the earlier opinions (*see* App. 99a n.2). These have since merged into the single Carpenters 46 Northern California Counties Master Agreement referred to in this petition as the Master Agreement.

become indentured and thus admitted to the training program.

Second, JATC offices would give anyone a letter of subscription, also known as a "hunting license," which enabled the holder to hunt for jobs directly from employers. If the applicant obtained a job, he or she became indentured without regard to the referral list. In practice, very few employers used the referral list and virtually all apprentices found their first jobs on their own.

The essence of respondents' complaint was that the JATC's hunting license system, adopted a year before their suit was filed, had a discriminatory effect on women. Respondents claimed that employers discriminated against women when hiring applicants with hunting licenses, and that the JATC's use of the system therefore violated Title VII. *Eldredge II*, App. 32a. By delegating authority over the selection of beginning apprentices to the employers, the JATC had allegedly adopted a facially neutral system with an adverse impact on women.

Respondents sought injunctive relief requiring the JATC to abandon the hunting-license system. Respondents had not yet articulated the precise system they sought, but as the District Court understood their goal,

> they envision[ed] a system requiring an employer who wishes to hire a beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of a number of non-discriminatory techniques.

Eldredge I, App. 106a-107a.

The District Court held the employers were necessary parties under Rule 19(a)(1) and indispensable parties under Rule 19(b). It reasoned that any relief it might grant against the JATC alone would be ineffective. In 1979, the District Court dismissed the action under Rule

19 for failure to join the employers. App. 87a-95a. Two years later, the Ninth Circuit reversed, holding that the employers were not indispensable parties under Rule 19(b) because they were not necessary parties under Rule 19(a), and remanded the case for further proceedings. *Eldredge II*, App. 29a-37a.

The Ninth Circuit noted that the absent employers would be necessary parties (1) if they were persons in whose absence complete relief could not be accorded among those already parties or (2) if, as a practical matter, in their absence, the disposition of the action might impair or impede their ability to protect an interest relating to the subject of the action. App. 33a. The Ninth Circuit concluded that the District Court had "misapprehended the legal inquiry" with respect to the first of these possibilities by viewing the employers' ability to frustrate any relief granted as an obstacle to complete relief among those already parties. App. 33a-34a. The possibility that an order issued solely against the JATC might "induce employers to avoid JATC's services" or even "to disband the training and referral system altogether" provided no basis for concluding that "complete relief" could not be granted as between the women applicants and the JATC. *Id.*

As to the second inquiry, the Ninth Circuit concluded that the employers' interest in selecting their own employees would not be impaired or impeded if they were not made parties. App. 35a-36a. The Ninth Circuit reasoned that, by signing the collective bargaining agreement, the employers had ceded to the JATC whatever legally protectible right they may have had in selecting apprentices to be trained. App. 36a. Further, without the joinder of the employers, no court order could require the JATC to embark upon programs beyond the authority granted the JATC under the trust fund agreement. *Id.* Hence, the Ninth Circuit saw "no danger" that any court would trench on the employers' rights under the collective bargaining agreement. *Id.*

In 1982, the Supreme Court denied a petition for certiorari to review the Ninth Circuit's decision that the employers were not "necessary" parties. Then Associate Justice Rehnquist wrote a dissent from the denial of certiorari which is discussed in detail *infra*.

In 1985, on cross-motions for summary judgment, the District Court granted summary judgment for the JATC, holding that the JATC could not be held responsible for the actions of the employers. *Eldredge III*, App. 76a-79a. The Ninth Circuit again reversed, holding that the JATC is responsible for selection decisions it delegates to the employers. *Eldredge IV*, App. 19a-20a. The Court of Appeals further held that the first-job requirement had a disparate impact upon female applicants, and that its use was not a business necessity. App. 20a-28a. The court remanded for the entry of summary judgment for the plaintiff class on the issue of Title VII liability and for trial to determine the appropriate remedy. App. 28a.

In 1991, the District Court held a trial on remedy. The plaintiff class proposed that the JATC no longer permit employers seeking beginning apprentices to choose from the entire pool of applicants as they were free to do under the "hunting license" system, but rather restrict them to referrals in numerical order off the applicant list. The plaintiff class also proposed a 20% affirmative action program, the appointment of a monitor, record-keeping and reporting requirements, active recruitment of female applicants, special orientation programs for new female apprentices, and a class on workplace discrimination and harassment for all apprentices. App. at 4a-5a. The JATC, on the other hand, proposed abolition of the first-job requirement for women seeking to become indentured apprentices. App. 5a. Any woman who took a brief introductory safety course would become indentured immediately, entitled to be listed on the out-of-work list of a local union and enrolled in JATC classes. See App. 59a, ¶ 9. Men would still have to find their own first jobs in order to become indentured. App. 5a.

While awaiting the District Court's decision, the JATC implemented its proposal. App. 5a. In 1993, the District Court adopted the JATC's proposal and rejected the proposals of the plaintiff class. *Eldredge V*, App. 55a-74a. The plaintiff class appealed.

For the third time, the Ninth Circuit reversed, holding that "[t]he district court abused its discretion by declining to implement the affirmative action plan proposed by the plaintiff class." *Eldredge VI*, App. 8a. The Ninth Circuit also held that the District Court abused its discretion by failing to end use of the hunting license system in the selection of male apprentices and by failing to order the JATC to require all applicants to satisfy the first-job requirement by referral in numerical order off the JATC's applicant register. App. 7a. In the Ninth Circuit's view, the 1991 abolition of the first-job requirement for women had established a "two-track" system in which indentured men would necessarily receive on-the-job training while indentured women might receive nothing more than classroom instruction. App. 6a. The court held that indenture without a first job amounted to yet another variant of discrimination against women. *Id.* Given the JATC's reliance on some form of the hunting license system for two decades, the court found that a quota system designed to increase female participation in the apprenticeship program was necessary and appropriate. App. 9a-12a. Until 20% of the participants in the program were women, the court held that 20% of newly hired beginning apprentices would have to be women. App. 8a-9a.

The Ninth Circuit instructed the District Court to issue an order implementing the affirmative action program mandated by its opinion within 60 days. App. 13a. The Court of Appeals also instructed the District Court to appoint a monitor to facilitate court supervision of the implementing order and to order additional remedies it deems helpful or necessary and consistent with the relief granted by the Ninth Circuit. *Id.* Aside from this limited

remand, the Court of Appeals panel retained jurisdiction. *Id.*

On January 17, 1997, the District Court issued an interim order implementing the relief mandated by the Ninth Circuit. See App. 38a-54a. Through successful negotiations between the parties, some provisions of the Ninth Circuit's mandate that created potential conflicts for employers subject to municipal local-hire affirmative action programs were eliminated. Still, the interim order establishes a strict quota system under which 20% of all newly hired apprentices must be women. In order to hire a beginning apprentice, an employer must contact the union which in turn will request a referral from the JATC. The JATC will refer the applicant who has waited longest on the applicant list unless the four previous applicants hired have been men. If the four most recent hires have been men, the JATC will refer the next female applicant on the applicant list. If the first female applicant referred is not hired, the JATC will continue to refer female applicants until one is hired. Employers remain free not to hire anyone referred by the union, including new apprentices, and may also dismiss without cause anyone referred by the union, apprentice or journeyperson, during the first three days of employment.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES AN IMPORTANT QUESTION OF THE APPLICATION OF RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A. The Ninth Circuit Has Failed to Follow the Pragmatic Approach to Rule 19 Espoused By This Court in *Provident Tradesmens Bank and Trust Company v. Patterson*, 390 U.S. 102 (1968).

Since the early days of this litigation, the JATC has argued that the action would ultimately founder for failure to join the absent employers. This has now come to pass. The long-awaited and disappointing fruit of this litigation

is an order that will neither vindicate the rights of women seeking to enter the carpentry trade nor avoid interference with the interests of the absent employers.

After 21 years of litigation, the District Court has issued a remedial order binding only on the JATC, implementing a Ninth Circuit mandate compelling the JATC to adopt a quota system for referral of women applicants to employers until 20% of the participants in the JATC's program are women. The order requires no affirmative action by employers to hire more women, and does not alter the employers' collectively bargained right to reject any applicant.

In its effort to modify hiring behavior of the absent, unrepresented employers, while exercising no direct jurisdiction over them, the District Court is vigorously manipulating the only lever at its disposal: the JATC's referral of apprentices to their very first job. But this mechanism is entirely inadequate to the task. Under the relevant collective bargaining agreements, the JATC has no power to compel hiring of any of its referrals. A woman who has worked a single day at the trade will become an indentured apprentice and receive no further referrals from the JATC. Meanwhile, although the order does not directly bind employers, the order does, as a practical matter, radically alter the employers' current hiring procedures by eliminating their right to select beginning apprentices from the entire pool of applicants.

The District Court has crafted an order that is at once ineffectual *and* intrusive on the interests of absent parties. Rule 19, Federal Rules of Civil Procedure, is designed to prevent such a wasteful misuse of court resources. To this end, Rule 19(a)(1) requires joinder of a party if "in his absence complete relief cannot be accorded among those already parties." Rule 19(a)(2)(i) requires joinder of a party if the disposition of an action in his absence may "as a practical matter impair or impede his ability to protect" an interest in the subject matter of the action.

Now that the decree fashioning relief has finally been issued, it is plain that the District Court, guided by the Ninth Circuit's explicit mandate, has been unable to avoid either of the two evils addressed by these provisions of Rule 19: incomplete relief among the parties to the litigation and interference with the interests of absent parties.

Twenty years ago, the District Court first questioned the propriety of proceeding with the JATC as the sole defendant and held that the affected unions and employers were necessary parties in this lawsuit under F.R.C.P. 19(a). After respondents failed to join the unions and employers, the District Court dismissed respondents' suit for failure to join indispensable parties under F.R.C.P. 19(b). The Ninth Circuit's 1981 decision in *Eldredge II* overruling the District Court has led directly to the court's difficulties in fashioning relief today.

1. *Justice Rehnquist's Dissent From Denial of Certiorari In This Case In 1982 Correctly Predicted That The District Court Would Be Unable to Fashion Effective Relief Without Interfering With the Interests of the Absent Employers.*

In 1982, then Associate Justice Rehnquist wrote a dissent from the denial of certiorari respecting *Eldredge II* that correctly foresaw the untenable situation that has now come to pass. Justice Rehnquist observed that, without the employers themselves joined as defendants, the District Court would ultimately be forced to choose between injunctive relief directed at the employers, who had never had their day in court, or an ineffectual order that would not gain anything of practical value for the plaintiff class. Since the federal courts were unlikely to begin issuing injunctions against non-parties, Justice Rehnquist feared that the Ninth Circuit's approach would "tend to reduce the District Courts to '"issuers" of paper decrees which neither adjudicate nor, in the end, protect rights.'" App. 86a (citing *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970)).

Undoubtedly, there are some Title VII actions charging unions or apprenticeship programs with sex discrimination in which employers would not be necessary parties since complete relief could be accorded in their absence. *See, e.g., Kaplan v. Int'l Alliance of Theatrical & Stage Employees & Motion Picture Machine Operators of United States & Canada*, 525 F.2d 1354 (9th Cir. 1975); see also *Eldredge I*, App. 120a-121a ("[n]one of these decisions . . . involved allegations of discriminatory conduct by employers"). That is impossible here because the very theory of liability implicates the employers as the source of the discrimination.

This case involves a Title VII disparate impact theory in which the allegedly unlawful employment practice consisted of the JATC's leaving the selection and hiring of beginning apprentices up to the individual employers signatory to the collective bargaining agreement. The JATC played no role in the evaluation of potential apprentices. It did not test, interview, or otherwise screen applicants. The JATC required only that applicants be 17 years or older and hold a high school diploma. The hiring decision was left up to employers who did the interviewing, assessment, and hiring of new apprentices. Under these particular circumstances, the case against the JATC is based entirely on the employers' hiring practices. The Court of Appeals has acknowledged as much, stating unequivocally that "[b]ecause employers more often than not hand picked male applicants, the selection system utilized by the JATC had a disparate impact upon female applicants." *Eldredge VI*, App. 3a. By artfully characterizing the JATC's complete lack of involvement in the selection and hiring of beginning apprentices as a "selection system," the Court of Appeals could brush off "the JATC's claim that the real culprits are the employers" (App. 10a) and proceed to award "complete relief" without any participation of the employers who "handpicked male applicants."

Justice Rehnquist, in his dissent from the Court's earlier denial of certiorari, pointed out two ways in which the

Court of Appeals was abandoning the "pragmatic" approach the Court had commended in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 106-07, 116-17, n.12 (1968). First, the Court of Appeals maintained that "relief on plaintiffs' claims against JATC as an entity could be afforded by an injunction against JATC alone." App. 35a. This, he observed, "seems to mean that since plaintiffs have sought an injunction against JATC, the District Court can afford the complete relief contemplated by Rule 19(a)(1) by granting only what the plaintiffs seek, regardless of whether the order would have any impact on the discrimination that was apparently the reason for the lawsuit." App. 83a-84a. As the Fifth Circuit has observed, whether a party must be joined should depend upon the purpose of the litigation, not upon whether there is a prayer or request for any affirmative action on the part of the absent party. *Leber v. Canal Zone Central Labor Union and Metal Trades Council*, 383 F.2d 110, 115 (5th Cir.), *cert. denied*, 389 U.S. 1036 (1967).

Second, in holding that effective relief could be fashioned between the existing parties, the Court of Appeals ignored the obvious dissonance between its premise that there was "no evidence" that "employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC" (App. 35a) and the substance of the plaintiffs' complaint that, having been delegated the selection of new apprentices, the employers had hand-picked male applicants in disproportionate numbers (App. 3a). App. 84a. In Justice Rehnquist's view, the District Court would ultimately face a dilemma:

> If it ordered relief against JATC alone, it could not affect the alleged discriminatory practices. Rule 19(a)(1). If it ordered relief against the employer, it would almost certainly affect their right to select apprentices without affording them an opportunity

> to rebut the charge that they discriminate. Rule 19(a)(2)(i).

Id. (footnote omitted). It is this contradiction, explored by Justice Rehnquist in 1982, that has taken another 15 years of litigation to ripen.

2. *The Court of Appeals Escaped The Dilemma Explored in Justice Rehnquist's Dissent By Finding Incorrectly That the Employers Had Ceded Their Entire Interest In the Selection of Their Own Beginning Apprentices to the Apprenticeship Committee.*

The Court of Appeals has sought to escape the dilemma by glibly dismissing the employers' interest in selecting their own beginning apprentices. The court held that because the trust agreement that created the JATC granted it "full authority to structure the apprenticeship program and to select the apprentices . . . the employers have by contract ceded to JATC whatever legally protectible interest they may have had in selecting apprentices to be trained." App. 36a. As Justice Rehnquist noted:

> This is simply not correct. The agreement gives JATC authority only to select persons to refer to employers; an applicant does not become an apprentice and begin the training program until and unless an employer hires him. 440 F.Supp., at 510-512, 83 FRD, at 137. And as noted above, employers have bargained to retain their right to reject any applicant for any reason. Yet the Court of Appeals rather cavalierly found, in a proceeding to which the employers were not parties, that the employers have ceded these rights.

App. 84a-85a. The Ninth Circuit cited no provision of the trust agreement to support its assertion that the employers had ever legally surrendered the right to select their own beginning apprentices. The trust agreement empowered the JATC to establish an educational program for apprentices and journeymen to insure a supply of

skilled labor to employers. CR 36, Exh. 10, Apprenticeship and Training Trust Fund Agreement ("Trust Agreement"). Not a word about the selection of apprentices appeared in the document. *See* App. 115a ("no particular procedure for selecting apprentices is enshrined in any agreement"); *see also* App. 99a.

The Ninth Circuit's statement that "[t]he trust fund agreement grants full authority to JATC to structure the apprenticeship program and *to select the apprentices*" (App. 36a (emphasis added)), is an unsound leap from the text of the trust agreement which merely states, in pertinent part, that the JATC "shall have the power and duty to . . . establish, support or maintain Programs . . . for the purpose of educating and training persons as journeymen or apprentices." App. 98a-99a.

The Ninth Circuit also unjustifiably ignored the supremacy of the collective bargaining agreement over the trust agreement in defining the rights held by the employers. The trust agreement clearly stated that the rights and duties of all parties under the trust agreement were "[s]ubject to the provisions of the Collective Bargaining Agreements." Trust Agreement, art. 8, § 1. Nothing in the collective bargaining agreement supports the Ninth Circuit's theory that employers ever ceded the right to select their own beginning apprentices. In fact, the collective bargaining agreement strongly suggests otherwise. The employer is not required to hire anyone referred by the union. The Agreement provides that the employer "during the first three (3) days of employment may reject or discharge any employee for any reason." Master Agreement, § 30.

In addition, the practice by which the employers engaged in unfettered selection of their own beginning apprentices became an enforceable condition of the collective bargaining agreement. As this Court has explained, a collective bargaining agreement is "more than a contract." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363

U.S. 574, 578 (1960). "[T]he industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Id.* at 581-82. This Court has held that a unilateral change of conditions by a party to a collective bargaining agreement without negotiation may violate § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). *NLRB v. Katz*, 369 U.S. 736, 748 (1962); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967). Arbitrators frequently refer to past practice to fill in the gaps where the text of collective bargaining agreements is silent. *See* Elkouri & Elkouri, *How Arbitration Works* (1972) at Ch. 12 (describing the role of past practice in enabling arbitrators to fill in the gaps in collective bargaining agreements).

Finally, as the District Court recognized in its first opinion, the employers "retained a significant measure of control over the system [for selecting apprentices], since they appoint half the members of the JATC and may bargain with the remaining union members." App. 123a-124a.

3. *The Remedy Adopted Imposes an Affirmative Action Quota on Employers Who Have Never Been Represented in These Proceedings.*

The Ninth Circuit's recent mandate failed to resolve the long-standing contradiction. Formally, the implementing order does not change the contractual right of employers to reject any applicant referred by the JATC. However, the new order indisputably revokes the employers' former right to select beginning apprentices from the pool of all qualified applicants. Employers as a class, who have never been represented in this litigation, must now adopt a 20% hiring quota for female beginning apprentices. To say the absent employers had no interest in this litigation that merited the protection of Rule 19 is to elevate form over substance.

B. The Supreme Court's Clarification of Rule 19 Is Needed.

1. The Court Should Exercise Its Supervisory Role With Respect to the Federal Rules To Prevent the Reemergence of a Narrowly Technical View of the Interests Protected By Rule 19.

The Ninth Circuit's holding that the employers were not "to be joined if feasible" is a throwback to the days when courts overemphasized technical issues in deciding when an absent party was "necessary." From the promulgation of the federal rules in 1938 until 1966, the provisions for compulsory joiner of parties in Rule 19 remained unchanged. In 1966, "a restructuring of major proportions" was undertaken "to eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases." Cohn, The New Federal Rules of Civil Procedure, 1966, 54 Geo.L.J. 1204; *see also, Park v. Didden*, 695 F.2d 626, 627 (D.C. Cir. 1982) (acknowledging 1966 amendments to the rule as attempt to circumvent "a jurisprudence of labels").

The Advisory Committee rewrote the rule to reflect a pragmatic, rather than taxonomic, approach to deciding when it is fair to proceed with litigation in the absence of third parties who arguably ought to be present. The new rule used the functional term "person to be joined if feasible" rather than the conclusory term "necessary party" to refer to those who ought to be joined if possible. In evluating whether "complete relief among those already parties" could be granted, the Advisory Committee notes to the 1966 amendment provide a standard that has been abandoned by the Ninth Circuit:

> Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding

> repeated law suits on the same essential subject matter.

The question of what is partial or "hollow" relief must be decided by reference to a practical analysis. A remedy for employment discrimination which does not affect apprentices' job prospects would seem rather "hollow" in addressing discrimination against women in a four-year apprenticeship program.

This Court has also emphasized that the public has an interest in allocating the finite resources of the judicial system for the "complete, consistent and effective settlement of controversies." *Provident Tradesmens Bank and Trust Company v. Patterson*, 390 U.S. 102, 111 (1968). It has required that absent parties be joined or the action dismissed when the essential purpose of the relief sought could not be realized without the performance of some act by an absent party. See, e.g., *Kendig v. Dean*, 7 Otto (97 U.S.) 423 (1878); *Warner Valley Stock Company v. Smith*, 165 U.S. 28 (1897); *Gnerich v. Rutter*, 265 U.S. 388 (1924).

At all times, the inquiry under Rule 19 is to be guided by practical consequences. As Justice Breyer has written:

> In applying Rule 19—a rule that comes freighted with history, we must keep in mind the fact that this Rule aims to achieve a practical objective. Rule 19 . . . aims "to achieve judicial economies of scale by resolving related issues in a single lawsuit," while at the same time preventing "the single lawsuit from becoming fruitlessly complex or ending." These rules seek to involve "as many apparently concerned persons as is compatible with efficiency and due process."

Pujol v. Shearson/American Express, Inc., 877 F.2d 132, 134 (1st Cir. 1989) (citations omitted). When applying Rule 19(a) to decide if a party is "necessary," "a court will essentially decide whether considerations of efficiency and fairness, growing out of the particular circumstances of the case, require that a particular person be joined as

a party." *Id.*, citing Friedenthal, Kane & Miller, *Civil Procedure* 336 (1985) ("The basic objective underlying all claim and party joinder rules is rendering complete justice with as little litigation as possible.").

The Ninth Circuit's dismissal of the employers' interest in this case represents unwarranted reemergence of a narrowly technical, rather than practical, approach to defining the "interest" an absent party must have to qualify for joinder under Rule 19(a). The Ninth Circuit has joined other courts in adopting a narrower approach to Rule 19(a) that is redolent of the old "jurisprudence of labels" eschewed by drafters of the 1966 revisions. The Third Circuit has reduced the Rule 19(a)(2)(i) inquiry to determining whether or not the outcome of the case is "reasonably likely [to] preclude the absent party with respect to an issue material to the absent party's rights or duties under standard principles governing the effect of prior judgments." *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 407 (3rd Cir. 1993). This is less satisfactory than the Supreme Court's mid-19th century definition of necessary parties as those "[p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it." *Shields v. Barrow*, 17 How. (58 U.S.) 130, 139, 15 L.Ed. 158 (1855). It is time for the Supreme Court to reemphasize that where a court is faced with the dilemma of choosing between fashioning ineffective relief and imposing on the legally protectible interests of absent parties, the parties should be joined, if feasible. In analyzing such dilemmas, courts should not follow the example of the Ninth Circuit which ultimately mandated relief that erred in both directions.

2. *The Ninth Circuit's Ruling Invites Wasteful, Piecemeal Litigation of Employment Discrimination Claims By Trivializing Proof of Causation.*

As a practical matter, the Ninth Circuit's ruling makes every joint apprenticeship committee an opportune target for similar lawsuits that will likely follow the same desultory course to an equally unsatisfactory outcome. Under the theory of this case, a defendant committee can be found liable for any statistical imbalance in the number of Title VII-protected apprentices. The fiction that the joint committee exerts unlimited legal control over who is admitted into or employed in the apprenticeship program eliminates any need to prove causation because whatever happens can be presumed "caused" by the apprenticeship committee's employment practices. If apprenticeship programs that exercise no role in selecting new apprentices can be proved liable for what is in essence alleged employer discrimination, every apprenticeship committee in the country, no matter what employment practices it adopts, can be held accountable for any employer practice which diminishes the numbers of apprentices in Title VII-protected classes.

As Justice Rehnquist observed early in this case,

> the approach of the Court of Appeals will tend to reduce the district courts to issuers of " 'paper' decrees which neither adjudicate nor, in the end, protect rights." This is hardly a sound way to expend the energies of overburdened district judges. Furthermore, plaintiffs will be frustrated by their failure to obtain prospective relief, but will gain this frustration only after lengthy litigation and expense, instead of reaching the same practical result after relatively brief proceedings. Indeed, the only genuine beneficiaries of the Court of Appeals' approach are attorneys who may be able to collect statutory attorney's fees from defendants on a basis of legal "suc-

> cess," without having gained anything of practical value for their clients.

App. 86a.

This forecast was prescient. Plaintiffs' counsel has so far received $400,000 and is presently seeking an additional $252,140 in attorney's fees. These fees, as well as the costs of legal defense, have taxed the JATC's fixed budget for training apprentices. Money intended for education has gone to litigation. Apprenticeship trust funds ought not to be turned into targets of convenience.

By understaking this lawsuit without joining the employers who allegedly discriminated, plaintiffs initiated litigation that threatens to span a period lasting a generation or more. No employer has yet been found to have discriminated against a single job applicant; no employer is bound by the results of this litigation; no employer is required to improve its hiring record with respect to women. When and if any of the absent employers is found to have engaged in provable discrimination, the litigation must begin anew. A more wasteful approach to employment discrimination litigation is difficult to imagine.

3. *The Ninth Circuit's Approach Circumvents Title VII's Requirement That Conciliation Be Attempted Prior to Litigation.*

Another consideration meriting the court's attention to this case is the special importance of conciliation in the statutory scheme of Title VII. The absence of interested parties reduces the likelihood that efforts at conciliation will succeed. Before bringing an employment discrimination lawsuit, a claimant must file an administrative charge with the Equal Employment Opportunity Commission or similar state agency. Before permitting a lawsuit to be filed, the agency is then supposed to attempt a conciliation between the parties. Respondents never brought the absent employers and unions in this case into such a process. Had they done so, this entire controversy might have been

resolved without litigation. In *Local Union No. 329, International Longshoremen's Ass'n v. South Atlantic & Gulf Coast District of the Int'l Longshoremen's Ass'n*, 295 F.Supp. 599 (D.C. Tex. 1968), an action was brought under Title VII by a local all-black union against the international union district seeking an injunction against the alleged maintenance of segregated locals and segregated work gangs. The court stayed the action pending exhaustion of the available administrative remedies and held that not only should the three locals be joined in the administrative proceeding but that upon the case's return to federal court, the three absent locals would have to be joined before any adjudication could be made. The court based its decision on the effect a decree in favor of plaintiff would have on the white locals.

If the Ninth Circuit had followed this course in 1981, it is possible that all the affected parties would have settled this case long ago. It is certain that they would not have reached the present predicament.

II. THIS CASE RAISES AN IMPORTANT QUESTION CONCERNING QUOTA RELIEF IN TITLE VII CASES.

Having found the JATC liable for employment discrimination, the Ninth Circuit has ordered a 20% female affirmative action quota on hiring of new apprentices until 20% of participants in the JATC's program are women. The Ninth Circuit's imposition of this arbitrary numerical quota is improper in three respects: the quota is 1) unjustified by the JATC's conduct, 2) unsupported by the evidence, and 3) unachievable.

A. Good Faith Defense of a Title VII Suit Should Not, By Itself, Constitute Grounds for a Finding That a Defendant's Conduct Is Sufficiently Egregious and Obstinate That a Quota Is Mandated.

Courts have frequently observed that egregious and obstinate conduct is a necessary predicate for the imposi-

tion of a numerical quota. Court-ordered affirmative action "may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dessipate the lingering effects of pervasive discrimination." *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 445, 106 S.Ct. 3019, 3034, 92 L.Ed.2d 344 (1986) (plurality opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.; *see id.* at 483-84, 106 S.Ct. at 3054 (Powell, J., concurring in part and concurring in the judgment) ("numerical goals" may be proper to remedy an employer's "particularly egregious conduct"). The Supreme Court recently explained that federal courts may order affirmative action to remedy " 'pervasive, systematic, and obstinate discriminatory conduct.' " *Adarand Constructors, Inc. v. Pena*, —— U.S. ——, 115 S.Ct. 2097, 2117, 132 L.Ed.2d 158 (1995) (quoting *United States v. Paradise*, 480 U.S. 149, 167, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987) (plurality opinion of Brennan, J.)).

To support its imposition of a quota, the Ninth Circuit unfairly characterized the JATC's track record in harsh terms. Relying on 1991 data which predated the JATC's elimination of the first-job requirement for women, the Ninth Circuit concluded that "the JATC's reliance on the hunting license system has for decades kept women out of the carpentry trade." App. 10a. The court declared the conduct of the JATC to be "egregious and obstinate." *Id.* The court described the JATC as having persisted in exclusionary policies after 21 years of litigation, including three appeals. Although the Ninth Circuit had "twice rejected the JATC's claim that the real culprits are the employers, the JATC persist[ed] in claiming that [the courts] cannot render effective relief in the absence of the employers." *Id.* The JATC had then unilaterally implemented its own "facially discriminatory" affirmative action proposal while awaiting a ruling from the District Court. *Id.* Calling the JATC the carpentry

craft's "gatekeeping organization," the Ninth Circuit characterized the JATC as having "waged a relentless battle to preserve the status quo." App. 10a-11a.

A closer look reveals the Ninth Circuit's portrait of the JATC as inaccurate. The "obstinate" behavior identified by the Court of Appeals consists of the JATC's having defended itself in this litigation and having failed to adopt voluntarily the remedy sought by respondents. Given the see-saw history of this case, the Ninth Circuit might as well have described the District Court's opinions as obstinate. The District Court in four opinions by two judges found repeatedly in the JATC's favor, only to be reversed three times on appeal. Unlike the errant union in *Sheet Metal Workers*, the JATC has never violated any court order, engaged in bad faith conduct, or been cited for contempt. *See Sheet Metal Workers*, 478 U.S. at 427-30, 434-36.

Although the Court of Appeals tagged the JATC with a "decades-long history of recalcitrance and foot-dragging" (App. 11a), the JATC has maintained a state-supervised affirmative action program for women and minorities that has been monitored and approved by the California Apprenticeship Council ("CAC") throughout the pendency of this litigation. *See Eldredge I*, App. 99a-100a; RT 5-184 to 5-191, Trial Testimony of Berkebile. Despite suggestions by the Ninth Circuit that institution of the "hunting license system" was motivated by invidious intent, the "hunting-license system," which was instituted the year before this suit began, has worked very well as an affirmative action plan for minorities. By 1995, minorities made up 40.5% of the active apprentices in the JATC's program. App. 140a. Women also made substantial progress from 0.4% of active apprentices (13 out of 3,200) in May 1976 to 9.0% (316 out of 3,527) in 1995. App. 105a, 140a. This is scarcely the record of an obstinate defender of the white male status quo. Despite the Ninth Circuit's harsh language, the JATC

does not have a record of bad faith and egregious conduct to support the court's imposition of a quota.

B. The 20% Quota Is Not Supported By Adequate Findings of Fact to Show That It Bears a Proper Relationship to the Relevant Labor Market.

The 20% quota is also improper because it was imposed without adequate supporting evidence that it bears a reasonable relationship to the relevant labor market. The purpose of race- or gender-based relief is to remedy the effects of past discrimination, not to maintain any particular racial or gender balance. *See Sheet Metal Workers v. EEOC*, 478 U.S. 421, 477-79 (plurality opinion) and 487 (concurring opinion of Powell, J.), 106 S.Ct. 3019, 92 L.Ed.2d 256 (1986). Nonetheless, the Court of Appeals has established a 20% quota for women with support from only one source, United States Department of Labor ("DOL") guidelines suggesting affirmative action goals for voluntary apprenticeship programs. One such guideline recommends "a goal for women . . . at a rate which is not less than 50 percent of the proportion women are of the workforce in the program sponsor's labor market area . . . ." 29 C.F.R. § 30.4(f).

The regulation cited by the Ninth Circuit sheds little light on the issues here. The cited regulation is a general guideline for designing affirmative action plans for apprenticeable trades—from construction to gardening and locksmithing. The guideline is not intended to be a quota which any apprenticeship program is required to achieve. Apprenticeship programs are expected to make a good faith effort to expand opportunities and provide equal opportunity to women and minorities, but there is no punitive provision attached to the cited regulation. In relation to the statutory scheme of which the regulation is a part, the agency with specific responsibility for evaluating the JATC's performance has been the California Apprenticeship Council ("CAC"). See *California Divi-*

sion of Labor Standards Enforcement v. Dillingham Construction, —— U.S. ——, No. 95-789 (filed Feb. 18, 1997), slip op. at 2-3 (describing statutory scheme under which CAC is authorized to approve apprenticeship programs for federal purposes). Yet CAC has repeatedly certified the JATC's good faith efforts in recruiting minorities and women.

The 20% quota here cannot be squared with the guidelines enforced by DOL's Office of Federal Contract Compliance Programs ("OFCCP") which are specific to the construction industry. OFCCP enforces affirmative action requirements with respect to federal contractors pursuant to Executive Order 11246 and statutes. The agency is required to develop specific goals for minority and female utilization to be incorporated in affirmative action requirements for holders of federal construction contracts. 41 C.F.R. § 60-4.6. The agency's current goal for the utilization of women by federal contractors is 6.9% of work hours. Federal Register of April 7, 1978, 43 F.R. 14899, 14900, at Appendix A; Federal Register of Dec. 30, 1980, 45 F.R. 85750, 85751. Current goals for the utilization of minorities in Northern California range between 6.6% and 28.9% of total hours worked, depending on geographical location. Federal Register of October 3, 1980, 45 F.R. 65979, 65984, at Appendix B-80.

According to CAC's statistics, the JATC's apprenticeship programs exceeded both of these goals in 1995 with minorities at 40.5% and women at 9.0% participation rates. *See* App. 140a. Furthermore, in 1995, the JATC's program with 9.0% active female apprentices exceeded the California average of 6.04% for women in the construction trades. Calif. Dept. of Industrial Relations, Division of Apprenticeship Standards & California Apprenticeship Council Annual Report on Actvities to the Legislature and Public, 1995, Exh. 6. With an affirmative action record exceeding federal goals for both minority and female participation in the construction trades, the

JATC does not qualify for the Ninth Circuit's harsh approach.

The 20% participation quota set by the Ninth Circuit, nearly triple the goal established by DOL for federal contractors, is not tied in any way to the actual ratio of women applicants past, present, or future, or to the conditions that actually exist in the building trades in California or anywhere else in the world. To comport with this Court's past rulings, a quota of this sort is permissible only where necessary to eliminate the lingering effects of past discrimination. *Sheet Metal Workers v. EEOC*, 478 U.S. at 445. Petitioner has no quarrel with undertaking a program to increase women's participation in the carpentry trade and its own apprenticeship program; and has done so with some success for many years. But the numerical quota set by the Ninth Circuit has been plucked from thin air.

C. The Ninth Circuit Has Imposed An Impermissible "Permanent" Quota.

Because the 20% quota is not realistically related to the number of women applicants even after many years of future compliance, the Ninth Circuit has in effect imposed an permissible permanent quota on the JATC. See *Thompson v. Sawyer*, 678 F.2d 257, 298 (D.C. Cir. 1982) (stating that quotas should be of short duration, be targeted specifically at mending the identified discrimination, avoid unnecessary infringement upon other's rights, and be implemented only after consideration is given to alternate methods of relief). An official of the California Department of Apprenticeship Standards, the administrative arm of the CAC, testified as an expert at trial that a 21.5% goal for women was not realistic. RT 5-204. To justify the 20% quota, the Ninth Circuit has found that arbitrary barriers created by the JATC's indenture systems in place from 1975 through 1996 depressed women's participation in the carpentry trade. This in turn discouraged women from even applying to the JATC's program. The

court found that the shortage of female applicants was likely to exist until "a critical mass of women has successfully entered the carpentry trade." App. 11a. The Ninth Circuit concluded that only with its own temporary and narrowly tailored affirmative action program could the necessary critical mass of female carpenters be achieved, and the lingering effects of the JATC's past discrimination be eliminated. *Id.*

A program that terminates only when women comprise 20% of the apprentces cannot properly be described as "temporary." Although the Ninth Circuit considers the affirmative action program temporary merely because it contains a termination clause, a termination clause that has no relationship to the number of applicants may never be achieved. It is quite possible that, even after many years of implementation of the Ninth Circuit's decree and strenuous efforts by the JATC, women will remain significantly below 20% of the applicant pool for reasons beyond the control of the JATC and having nothing to do with the lingering effects of any discrimination practiced by the JATC.

First, men and women acquire occupational aspirations long before they learn of the indenture system used by their local carpentry apprenticeship program. The Ninth Circuit scoffs at the straw man of "biological determinism," but overlooks the impact of socialization upon which the JATC has only the most limited power to act. The Ninth Circuit's statement that the hunting license system is "probably the leading reason why women make up only 5% of the JATC's current applicant pool" (App. 11a) is pure speculation. No one knows what the ratio of women to men applicants would be if the JATC had used a numerical referral list for the past 22 years. However, respondents did not, because they could not, introduce any evidence that there is any construction trade apprenticeship program anywhere in the country 20% of whose applicants are women. Before conducting a social experi-

ment on the JATC, the court should have demanded some evidence to support the 20% quota or fashioned relief that would clearly terminate when the effects of the JATC's past practices could no longer be held responsible for any statistical disparities in the integration of women into the trade.

Second, whether any woman will complete the apprenticeship program or remain in it after becoming indentured depends primarily on the actions of strangers to this litigation. The order implementing relief has no binding effect on the employers and unions of whose collective bargaining agreement the JATC is a mere artifact. The order has no effect on the dispatch or hiring of any apprentice after the first successful referral to a job that may last no more than a day. The order implementing relief calls on the JATC to include a class on sexual harassment as part of its curriculum, but nothing is required of the union or employers to change the culture of the trade. Women may leave the apprenticeship program for a variety of reasons that are beyond the control of the JATC. Yet, the Ninth Circuit, caught in the contradiction of attempting to fashion complete relief without joinder of the principal actors, demands that the JATC by itself achieve a 20% female participation rate or remain forever under court order.

Legally, the referral quota ordered by the Ninth Circuit is limited to the task of eliminating the lingering effects of the hunting license system, which allowed employers to select and hire beginning apprentices from the entire pool of applicants. But this quota reaches much farther. Whatever its wisdom as social policy, the Ninth Circuit's mandate exceeds the legitimate relief it may grant against the JATC under this Court's established jurisprudence. Because of the extraordinary importance of defining the appropriate use of quotas under Title VII, petitioner respectfully suggests that clarification by the Supreme Court will provide much-needed guidance to the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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* For clarity's sake, the designation of opinions as *Eldredge I, II*, and so forth in this petition follows the Ninth Circuit's usage in its most recent opinion, referred to here as *Eldredge VI*.

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APPENDIX A

Opinion By Court Whose Opinion Is Sought To Be Reviewed

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-16925

LINDA ELDREDGE, individually, and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding
D.C. No. CV-75-2062-JPV

Argued and Submitted Feb. 15, 1995
Decided Sept. 9, 1996

Before FLETCHER, REINHARDT, and KOZINSKI, Circuit Judges.

FLETCHER, Circuit Judge:

Twenty-one years and three appeals ago, Linda Eldredge brought this class action against the Joint Apprenticeship and Training Committee ("JATC"), alleging that the method it used to select carpentry apprentices had an impermissible disparate impact upon female applicants. Nine years ago, we agreed and remanded for a trial on remedies. *Eldredge v. Carpenters 46 Northern Cal. Counties Joint Apprenticeship & Training Comm.*, 833 F.2d 1334, 1341 (9th Cir.1987), *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988). Now, the plaintiff class appeals the district court's remedial order, arguing it will actually reduce opportunity for women who seek to enter the apprenticeship program rather than afford increased access. Because the remedies adopted by the district court are unlawful, inadequate, and contrary to the principles we set forth in *Eldredge IV*,[1] we reverse and remand with instructions to adopt adequate remedies.

I. FACTS AND PRIOR PROCEEDINGS

The JATC is a joint labor-management committee, established pursuant to a trust agreement, that administers a carpentry apprenticeship program in Northern California. The four-year program combines classroom training with on-the-job experience, and leads to journeyman status. Under the trust agreement, the JATC has full authority to select the apprentices. For decades, the JATC utilized a "first-job requirement" in its selection process, under which an applicant could not obtain admission without first obtaining employment with a union contractor. The first job requirement is vital, for a jobless apprentice will obtain no on-the-job experience. An applicant could satisfy this requirement in one of two ways. First, if a contractor asked the union for an ap-

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[1] See the procedural history following.

prentice and did not name a particular individual, applicants were dispatched in numerical order from a referral list. Second, under the "hunting license" system, a contractor could ask for a particular apprentice by name.

In practice, most employers used the hunting license system most of the time. Because employers more often than not hand-picked male applicants, the selection system utilized by the JATC had a disparate impact upon female applicants. For the years 1976 through 1984, the female admission rate was only 54% of the male admission rate (i.e., while 39% of male applicants were admitted, only 21% of female applicants were admitted). Matters subsequently became even worse. For the years 1985 through 1990, the female admission rate was only 48% of the male admission rate (i.e., while 48% of male applicants were admitted, only 23% of female applicants were admitted). Because many fewer women than men applied, the number of women actually admitted to the program has been low: women have always been less than 3% of any entering group of apprentices.

In 1975, after unsuccessfully seeking admission to a JATC apprenticeship program, Linda Eldredge filed this class action against the JATC in federal district court. The plaintiff class alleged that the procedures used by the JATC to select apprentices had an impermissible adverse impact on women and therefore violated Title VII, 42 U.S.C. § 2000e-2(d).[2] In 1977, the district court dismissed the action under Federal Rule of Civil Procedure 19 for failure to join the 4,500 potential employers

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[2] 42 U.S.C. § 2000e-2(d) provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

of apprentices. *Eldredge v. Carpenters 46 Northern Cal. Counties Joint Apprenticeship & Training Comm.*, 440 F.Supp. 506 (N.D.Cal.1977) (*Eldredge I*). In 1981, we reversed, holding that the employers were not necessary parties under Rule 19(a), and remanded the case for further proceedings. *Eldredge v. Carpenters 46 Northern Cal. Counties Joint Apprenticeship & Training Comm.*, 662 F.2d 534 (9th Cir.1981) (*Eldredge II*), *cert. denied*, 459 U.S. 917, 103 S.Ct. 231, 74 L.Ed.2d 183 (1982).

In 1985, on cross-motions for summary judgment, the district court granted summary judgment for the JATC, holding that the JATC could not be held responsible for the actions of the employers. *Eldredge v. Carpenters 46 Northern Cal. Counties Joint Apprenticeship & Training Comm.*, No. C-75-2062-JPV, 1985 WL 25725 (N.D.Cal. Oct. 24, 1985) (*Eldredge III*). In 1987, we reversed, holding that the JATC is responsible for the selection decisions it delegates to the employers. *Eldredge v. Carpenters 46 Northern Cal. Counties Joint Apprenticeship & Training Comm.*, 833 F.2d 1334, 1337 (9th Cir.1987) (*Eldredge IV*), *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988). We further held that the hunting license system has a disparate impact upon female applicants, and that its use is not a business necessity. *Id.* at 1338-41. We reasoned that "an alternate method [of selecting apprentices]—numerical referral from the new applicant referral list—is already in place." *Id.* at 1340. We remanded "for the entry of summary judgment for the plaintiff class on the issue of Title VII liability based on the JATC's use of the 'hunting license' system and for trial to determine the appropriate remedy." *Id.* at 1341.

In 1989, the district court entered summary judgment for the plaintiff class. In 1991, the court held a trial to determine the proper remedy. The plaintiff class proposed that the JATC retain the first-job requirement, but eliminate the hunting license system and rely solely on the

already-existing numerical referral list. The plaintiff class also proposed a temporary 20% affirmative action program, the appointment of a monitor, record-keeping and reporting requirements, active recruitment of female applicants, special orientation programs for new female apprentices, and a class on workplace discrimination and harassment for all apprentices. The JATC, on the other hand, proposed a two-track system, under which men would still need to meet the first-job requirement under the hunting license system, but women would not need to meet any first job requirement.

Shortly after the trial, the JATC unilaterally implemented its own proposals. In 1993, the district court adopted the proposals of the JATC and rejected the proposals of the plaintiff class. *Eldredge v. Carpenters 46 Northern Cal. Counties Joint Apprenticeship & Training Comm.*, No. C-75-2062-JPV (N.D.Cal. Sept. 9, 1993) (*Eldredge V*). The plaintiff class appeals.

II. DISCUSSION

We have jurisdiction, 28 U.S.C. § 1291. In the Title VII context, we review an award of remedies for an abuse of discretion. *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1495 (9th Cir.1995). We also review factual findings for clear error and legal determinations de novo. *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

A

The district court abused its discretion by adopting the two-track remedy implemented unilaterally by the JATC. This plan is not gender-neutral: under it, women may enter the apprenticeship program without first obtaining a carpentry job, and men may not. Such facially discriminatory remedies to Title VII violations must, at the very least, be both necessary and narrowly tailored to remedy an employer's past discrimination. *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 476,

106 S.Ct. 3019, 3050, 92 L.Ed.2d 344 (1986) (plurality opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); *see id.* at 486, 106 S.Ct. at 3055 (Powell, J., concurring in part and concurring in the judgment). The two-track system adopted by the district court is neither necessary, narrowly tailored, nor effective to remedy discrimination.

As we made clear in *Eldredge IV*, the hunting license system is the principal problem. *See* 833 F.2d at 1341 (remanding "for the entry of summary judgment for the plaintiff class on the issue of Title VII liability based on the JATC's use of the 'hunting license' system"). Happily, the most obvious solution happens to be a gender-neutral solution: eliminate the hunting license system and use instead the already-existing numerical referral list. As we explain below, *see* Part II.B, *infra*, this solution is entirely proper. There is therefore no need to embrace the mutilated version of the hunting license system unilaterally adopted by the JATC, under which men continue as before to take advantage of the hunting license system, while jobless women enter a program that is meaningful only with on-the-job experience.

Moreover, the district court's remedy is not tailored to undo the decades of damage caused by the JATC's discriminatory selection process. In fact, this two-track system would make matters worse. First, it would bring women into the apprenticeship program without the most important tool they need to succeed: on-the-job training. Men, on the other hand, would be fully capable of taking advantage of the program's unique synthesis of classroom instruction and practical experience. Second, the district court's remedy would discourage the JATC from seeking out and selecting female applicants, for the JATC receives most of its funding from employer contributions that are pegged to hours worked by employed apprentices.

B

The district court abused its discretion by declining to enjoin the JATC from using the hunting license system. Hard data demonstrate that female applicants are only half as likely as male applicants to obtain admission into the apprenticeship program. In *Eldredge IV*, we held that "the differential results from use of the 'hunting license' system and not from some other element of the admission process." 833 F.2d at 1338. We then held that use of the hunting license system is not a business necessity. *Id.* at 1340-41. Having determined that the hunting license system had an impermissible disparate impact upon female applicants, we remanded "for entry of summary judgment for the plaintiff class on the issue of Title VII liability *based on the JATC's use of the 'hunting license' system . . . .*" *Id.* at 1341 (emphasis added). We could not have been more explicit in expressing our determination that the hunting license system is the problem, and that elimination of the hunting license system is required.

The district court further abused its discretion by declining to order the JATC to require all applicants to satisfy the first-job requirement by using the already-existing numerical referral list. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (to remedy a violation of Title VII, the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.") (citation and quotation omitted). In *Eldredge IV*, we repeatedly noted the availability of the referral list as a substitute for the unacceptable hunting license system. *Id.* at 1340, 1341 & n. 12. Unlike the hunting license system, the numerical referral list will eliminate from the selection process any gender discrimination by the contractors. And unlike the two-track system proposed by the JATC, the numerical referral will not place unemployed female apprentices in a job-

intensive training program where they cannot compete as equals with employed male apprentices.

It is true that this solution will limit the ability of employers to select the apprentices who will work at their sites. However, the numerical referral list has been in place and intermittently used by employers without objection for more than two decades. Moreover, employers have the power to refuse to hire any apprentice referred to them who does not meet their approval, as long as the refusal is not based on a discriminatory reason. While Robert Mounce, a JATC board member, testified that employers would object to the loss of the hunting license system, he admitted that he had never spoken to an employer that used the referral list. He also admitted that employers have an economic incentive to hire brand-new apprentices, who are paid less than other carpenters; this incentive makes it unlikely that employers frustrated by the loss of the hunting license system will stop using apprentices supplied by the JATC. Accordingly, the distirct court clearly erred by finding that the referral list remedy would be "an entirely new hiring procedure," that it would "divest employers of any discretion to choose their employees," and that it would be "unworkable." *Eldredge V*, slip op. at 11.

C

The district court abused its discretion by declining to implement the affirmative action plan proposed by the plaintiff class. *See Firefighters Institute for Racial Equality v. City of St. Louis*, 588 F.2d 235 (8th Cir.1978) ("*F.I.R.E.*") (reversing the district court's failure to implement an affirmative action program to remedy an employer's discrimination), *cert. denied*, 443 U.S. 904, 99 S.Ct. 3096, 61 L.Ed.2d 872 (1979). Under this plan, at least one out of every five applicants dispatched under the referral list must be a woman. If the first four applicants on the list are men, the next dispatch must be the

highest listed female applicant. If there is no female applicant listed, the JATC must undertake affirmative efforts to encourage women to apply. The plan terminates when 20% of the apprentices are women.

Court-ordered affirmative action "may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 445, 106 S.Ct. 3019, 3034, 92 L.Ed.2d 344 (1986) ("*Sheet Metal Workers*") (plurality opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); *see id.* at 483-84, 106 S.Ct. at 3054 (Powell, J., concurring in part and concurring in the judgment) ("numerical goals" may be proper to remedy an employer's "particularly egregious conduct"). As the Supreme Court recently explained in *Adarand Constructors, Inc. v. Pena*, —— U.S. ——, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), federal courts may order affirmative action to remedy an employer's " 'pervasive, systematic, and obstinate discriminatory conduct.' " *Id.* at ——, 115 S.Ct. at 2117 (quoting *United States v. Paradise*, 480 U.S. 149, 167, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987) (plurality opinion of Brennan, J.)). In the words of Justice Scalia, "we have permitted federal courts to prescribe quite severe, race-conscious remedies when confronted with egregious and persistent unlawful discrimination." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521, 109 S.Ct. 706, 736, 102 L.Ed.2d 854 (1989) (Scalia, J., concurring in the judgment) (citing *Paradise* and *Sheet Metal Workers*). Such affirmative action programs have been upheld against Equal Protection challenges. *See, e.g., Stuart v. Roache*, 951 F.2d 446 (1st Cir.1991) (Breyer, J.), *cert. denied*, 504 U.S. 913, 112 S.Ct. 1948, 118 L.Ed.2d 553 (1992); *Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792 (3rd Cir.1991); *F.I.R.E.*, 588 F.2d 235 (8th Cir.);

Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir.1987), *cert. denied*, 489 U.S. 1051, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989); *Howard v. McLucas*, 871 F.2d 1000 (11th Cir.), *cert. denied*, 493 U.S. 1002, 110 S.Ct. 560, 107 L.Ed.2d 555 (1989). *Cf. Geier v. Alexander*, 801 F.2d 799 (6th Cir.1986) (using affirmative action to remedy a public university's past discrimination).

Affirmative action remedies are appropriate in this case. The JATC's reliance on the hunting license system has for decades kept women out of the carpentry trade. Fewer than 3% of the applicants admitted to the apprenticeship program are women. Female applicants are only half as likely as male applicants to obtain admission. The data for 1985-1990 were even more discouraging than the data for 1976-1984. It is no surprise that women constitute only 5% of the JATC's applicant pool.

In the face of the blatantly obvious effects of the hunting license system, the conduct of the JATC has been egregious and obstinate. Twenty-one years and three appeals after Linda Eldredge first filed her action, the JATC persists in exclusionary policies. Nine years after we remanded this case to determine the appropriate remedy for "Title VII liability based on the JATC's use of the 'hunting license' system," *Eldredge IV*, 833 F.2d at 1341, the JATC is still arguing for the retention of the hunting license system, albeit in mutilated form. Though we have twice rejected the JATC's claim that the real culprits are the employers, *Eldredge II*, 662 F.2d at 536 (holding that the employers are not necessary parties); *Eldredge IV*, 833 F.2d at 1337 (holding that the JATC is responsible for decisions it delegates to the employers), the JATC persists in claiming that we cannot render effective relief in the absence of the employers. After the district court took the parties' recommendations under submission, the JATC unilaterally implemented its own facially discriminatory proposals. The bottom line is that women historically have been systematically excluded from car-

pentry work and for more than two decades have sought relief through the courts while the JATC, the craft's gatekeeping organization, has waged a relentless battle to preserve the status quo.

When deciding whether an affirmative action remedy for an employer's past discrimination is appropriate, "we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Paradise*, 480 U.S. at 171, 107 S.Ct. at 1066. *See also Sheet Metal Workers*, 478 U.S. at 476-79, 106 S.Ct. at 3050-52; *id.* at 486-88, 106 S.Ct. at 3055-56 (Powell, J., concurring). The proposal of the plaintiff class passes muster.

First, affirmative action is necessary in this case. Given the JATC's decades-long history of recalcitrance and foot-dragging, it is highly unlikely that the JATC will facilitate or even permit the entry of women into the apprenticeship program on equal footing with men without clear numerical goals. Moreover, as a direct result of the JATC's long-term use of the hunting license system, women have had far less than an equal opportunity to enter the carpentry trade. This discrimination is probably the leading reason why women make up only 5% of the JATC's current applicant pool. The extreme shortage of female applicants certainly cannot be explained by any sort of biological determinism. Until a critical mass of women has successfully entered the carpentry trade, it is unlikely that other women will believe that the arbitrary barriers to their admission have been lifted. Without a temporary and narrowly tailored affirmative action program, the necessary critical mass of female carpenters cannot be achieved.

Second, the proposal of the plaintiff class is flexible and temporary. It terminates under its own terms as soon as

women comprise 20% of the apprentices. It does not set an arbitrary deadline. If the JATC cannot satisfy the one-in-five ratio with its existing applicant pool, it need take only reasonable steps to recruit more female applicants. Rather than seeking a one-for-one parity between the genders, it simply sets "a benchmark against which the court [can] gauge [the JATC]'s efforts to remedy past discrimination." *Sheet Metal Workers*, 478 U.S. at 478, 106 S.Ct. at 3051.

Third, there is a proper relationship between the proposal's numerical goals and the relevant labor market. Guidelines of the United States Department of Labor addressing affirmative action in apprenticeship programs recommend "a goal for women . . . at a rate which is not less than 50 percent of the proportion women are of the workforce in the program sponsor's labor market area. . . ." 29 C.F.R. § 30.4(f). Unrebutted evidence at trial indicates that the one-in-five goal recommended by th plaintiff class is a conservative estimate based on this equation. While the JATC need by no means adopt a one-in-two ratio, it is equally clear that some critical mass of female carpenters is necessary to get the ball rolling in the right direction; a one-in-five ratio is a reasonable and modest accommodation.

Finally, the proposal of the plaintiff class imposes no undue burden on male applicants, who will still obtain up to 80% of the apprentice positions. The plan does not require the termination of men already admitted to the program, but only may defer temporarily the admission of some male applicants. Female applicants must meet the same minimum requirements as male applicants, including a high cshool or equivalent education, so qualified men will not be pushed aside to make room for unqualified women.

D

The district court abused its discretion by declining to appoint a monitor to insure the JATC's compliance with the remedial order. Over the course of more than twenty years of litigation, the JATC has done everything in its power to avoid levelling the playing field so that women can compete for admission to the apprenticeship program as equals with men. *See* Part II.C, *supra*. Under these circumstances, a monitor is necessary.

III. CONCLUSION

We REVERSE the adoption the two-track system proposed by the JATC, and we REMAND with instructions to adopt the following proposals of the plaintiff class: eliminate the hunting license system, require all applicants to use the sequential referral list to satisfy the first-job requirement, implement a 20% affirmative action program, and appoint a monitor.

The plaintiff class has suggested additional remedies, including a class for all apprentices regarding workplace harassment and discrimination. The district court shall reconsider the merits of these proposals in light of the foregoing. We REMAND these proposals for further consideration and instruct the district court to grant such additional relief as it determines appropriate.

The district court shall order the remedies mandated by this opinion within sixty days, and in due course such additional remedies as it deems helpful or necessary and consistent with the relief herein granted to achieve the expressed goals. It shall have continuing jurisdiction to monitor implementation of the remedies and supervision of the monitor. Subject to the limited remand here ordered, this panel retains jurisdiction of the case. *Neuschafer v. McKay*, 807 F.2d 839, 842 (9th Cir.1987).

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 85-2846

LINDA ELDREDGE, on behalf of herself and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted June 9, 1987
Decided Dec. 9, 1987

Before FLETCHER, REINHARDT and KOZINSKI, Circuit Judges.

FLETCHER, Circuit Judge:

Eldredge filed a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, alleging that the procedures used by the Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee (JATC) to admit applicants into its apprenticeship program have an impermissible adverse impact

on women. On cross-motions for summary judgment, the district court entered judgment in favor of the JATC because it found that Eldredge was attempting to hold the JATC liable for the discriminatory acts of third parties, rather than for its own conduct. Eldredge appeals from the grant of the JATC's motion and the implicit denial of her own motion for summary judgment. We reverse and remand.

BACKGROUND

The JATC is a joint labor-management committee, established pursuant to a trust agreement, that administers the carpentry apprenticeship program in Northern California. As we previously noted, "[t]he trust fund agreement grants full authority to JATC to structure the apprenticeship program and to select the apprentices." *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 662 F.2d 534, 538 (9th Cir.1981), *cert. denied*, 459 U.S. 917, 103 S.Ct. 231, 74 L.Ed.2d 183 (1982) (*Eldredge II*). To be admitted into the apprenticeship program, an applicant must (1) be at least seventeen years old; (2) have a high school diploma or G.E.D. equivalent; (3) have his or her name placed on a "new applicant referral list"; and (4) satisfy a first-job requirement by obtaining employment with a union contractor. *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 440 F.Supp. 506, 511 (N.D.Cal.1977), *rev'd*, 662 F.2d 534 (9th Cir. 1982) (*Eldredge I*).

It is the implementation of the first-job requirement that is at issue in this case. There are two ways in which applicants may obtain their first jobs. First, if a contractor requests the union to provide a beginning apprentice and does not name a particular individual, applicants are dispatched in numerical order from the new applicant referral list. Very few applicants obtain work through the referral system; indeed, it is nearly futile for an applicant to depend on this method. *Eldredge I*, 440 F.Supp.

at 512. Second, an applicant may find an employer willing to provide her with a job and to request her by name. This method, which is known as the "hunting license" system, is the one through which the vast majority of indentured apprentices obtain their first jobs and gain admittance into the apprenticeship program. For the years 1976 through 1984, 20.9% of female applicants and 38.8% of male applicants became indentured apprentices. The female admission rate was thus about 54% of the male admission rate.

In 1977, Linda Eldredge, on behalf of all unsuccessful female apprenticeship applicants, filed an amended complaint alleging that the JATC's use of the "hunting license" system has a disparate impact on women applicants and as such violates section 703(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(d).[1] In 1979, the district court dismissed the case under Federal Rule of Civil Procedure 19 for failure to join the 4,500 potential employers of apprentices. *Eldredge I*, 440 F.Supp. at 519-24. This court reversed, holding that the employers were not necessary parties under Rule 19(a) and thus could not be indispensable parties under Rule 19(b). *Eldredge II*, 662 F.2d at 536-38. On remand, the plaintiff class was certified, and both sides moved for summary judgment. The district court, finding the JATC to be the equivalent of an employment agency for the purpose of Title VII and finding the focus of Eldredge's complaint to be discrimination by employers rather than by the JATC, granted the JATC's motion. The court concluded that "[a]s plaintiff has established

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[1] 42 U.S.C. § 2000e-2(d) provides:

> It shall be unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

no basis on which to hold the JATC liable under Title VII for the alleged unlawful conduct of these employers, defendant's motion for summary judgment must be granted." *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.*, No. C75-2062-JPV at 5 (N.D.Cal. Oct. 24, 1985) (order) (*Eldredge III*). Eldredge timely filed notice of appeal from the district court's order.

STANDARD OF REVIEW

Both the grant of summary judgment to the JATC and the denial of Eldredge's summary judgment motion are reviewed de novo. *Idaho v. Hodel*, 814 F.2d 1288, 1292 (9th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 159, 98 L.Ed.2d 114 (1987). "Viewing all the evidence in the record in the light most favorable to the non-moving party, we must determine whether there is a genuine issue as to any material fact and, if not, whether the substantive law was correctly applied." *Id.*; Fed.R.Civ.P. 56(c). The entry of summary judgment is mandatory

> after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S .317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

DISCUSSION

The JATC's Motion for Summary Judgment

To assess the propriety of the district court's grant of summary judgment to the JATC, we must determine whether the court correctly found that the JATC could not be in violation of Title VII because it did not make the allegedly discriminatory hiring decisions. To establish a prima facie case of discrimination in a disparate impact case, "a plaintiff need only show that the facially neutral standards in question select applicants for hire [or, in this case, for admission to an apprenticeship program] in a significantly discriminating pattern." *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726-27, 53 L.Ed.2d 786 (1977). The JATC's requirement that applicants secure employment, which is implemented primarily through the "hunting license" system, is a "facially neutral standard" used to determine who will be admitted into the apprenticeship program. If the requirement as implemented has a significantly discriminatory impact on women applicants, Eldredge clearly has the basis for a claim under Title VII.

The district court held, in effect, that use of a facially neutral requirement is permissible even though it is discriminatory so long as it is a third party that is doing the discriminating. The distirct court reached this result by recharacterizing Eldredge's complaint as an attempt to hold the JATC liable for the discriminatory hiring practices of employers in the construction industry, in fact, Eldredge claims that the JATC is liable for its *own* implementation of the first-job requirement in a fashion that adversely affects women.[2] All that a disparate impact plaintiff must show, in the first instance, is the existence of a practice that serves to exclude a protected class in

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[2] That the employers' practices may be discriminatory lends support to the plaintiffs' claim that the "hunting license" method of meeting the first-job requirement is discriminatory.

disproportionate numbers. The JATC does not contend that some factor other than the "hunting license" system accounts for women's lower admission rate into its program.[3] It cannot avoid liability for the effects of its own admission procedures by pointing to the discriminatory practices of those to whom it has delegated the power to select apprentices.

The district court relied on *Kaplowitz v. University of Chicago*, 387 F.Supp. 42 (N.D.Ill.1974), which held that a law school was not required to police the discriminatory practices of employers who used its placement facilities. The *Kaplowitz* court found that the law school was an employment agency for the purposes of Title VII, *id* at 46; *see* 42 U.S.C. § 2000-2(b) (unlawful employment agency practices), but agreed with an EEOC opinion letter stating that the only obligation of an employment agency is to *refer* potential employees in a nondiscriminatory manner.[4] The JATC, however, does not stand in

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[3] The JATC's experts did attempt to show that factors other than gender discrimination by employers accounted for the fact that fewer women than men succeeded at securing employment. *See infra* note 6.

[4] The *Kaplowitz* court's holding was based primarily on its finding that the relief sought, which would have required the law school to determine whether particular law firms were guilty of discrimination, would bypass the Title VII statutory procedures. The court reasoned that in the course of reviewing a grant of injunctive relief to the plaintiffs it

> would eventually have to make a determination as to whether a prospective employer was in violation of Title VII, for only then would the Law School, as an operator of an employment agency, be in violation of Title VII. . . . But it is equally clear that courts shall not hear Title VII suits before they are heard by the EEOC. This procedure would frustrate the conciliation efforts the statute is designed to initiate.

387 F.Supp. at 49. In this case, the JATC would not be required to determine whether the employers discriminate and no court will ever be asked to hold that the employers violate Title VII in the absence of prior EEOC consideration of the allegation. This is

the same position as an employment agency. It is not simply an intermediary between applicant and employer. Rather, it is the JATC that possesses the full authority to select the carpentry apprentices for Northern California. *Eldredge II*, 662 F.2d at 538. The district court failed to recognize that the employers are merely delegates of the JATC's power to determine which applicants will be admitted into the program. Because the JATC may, under the trust agreement, select apprentices in any way it deems appropriate, it violates Title VII if it uses procedures that unjustifiably discriminate against a class of people protected under Title VII.

In holding that the JATC could not be liable for the discriminatory effects of the "hunting license" system, the district court incorrectly applied the substantive law. Accordingly, we reverse the district court's grant of summary judgment to the JATC.

Eldredge's Motion for Summary Judgment

We now turn to Eldredge's claim that the district court erred in not granting her cross-motion for summary judgment on the issue of liability.

At the outset, in a disparate impact case under Title VII, the plaintiff must make out a prima facie case. She carries the burden of demonstrating that the challenged employment practices produce a significantly discriminatory selection pattern. *Dothard*, 433 at 329, 97 S.Ct. at 2726; *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 442 (9th Cir.1987). A showing of discriminatory intent is not required in a disparate impact case, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 349, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir.1982), *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 838 (1984), and the Title VII plain-

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because, as discussed above, the issue is the impact of the "hunting license" system and whether it is a business necessity.

tiff "need not prove discrimination with scentific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence." *Bazemore v. Friday*, —— U.S. ——, 106 S.Ct. 3000, 3009, 92 L.Ed.2d 315 (1986). An uncontroverted showing of significant statistical disparities may be sufficient to establish the plaintiff's prima facie case. *New York Transit Auth. v. Beazer*, 440 U.S. 568, 584, 99 S.Ct. 1355, 1365, 59 L.Ed.2d 587 (1979); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275 (9th Cir.1981), *cert. denied*, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982).

If the plaintiff establishes a prima facie case of discriminatory impact, the burden then shifts to the defendant to refute the statistical data to show that no disparity exists or to prove that is practice is a business necessity. *Atonio*, 827 F.2d at 442.[6] An employer may demonstrate business necessity by proving that its selection criteria are essential to insure job safety or efficiency or are correlated with success on the job. "Job relatedness is a means of proving 'business necessity' when the purpose of a criterion is to predict the capacity of particular individuals to perform a job successfully." *Id.* "[T]he employer must demonstrate the 'manifest relationship' between the challenged practice and job performance." *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971)). "Precisely what the employer must prove will vary with the unique factors of different job settings, but '[t]he touchstone is business necessity.'" *Id.* (quoting *Griggs*, 401 U.S. at 431, 91 S.Ct. at 853). If the defendant carries its burden, the plaintiff may yet prevail by proving the availability of an effective nondiscriminatory alternative. *Contreras*, 656 at 1275. In short, Eldredge is entitled to summary

[6] The shift of the burden of persuasion to the defendant distinguishes disparate impact cases from disparate treatment cases, in which the burden at all times remains on the plaintiff. *See Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 442 (9th Cir. 1987).

judgment on the issue of JATC's liability if there are no disputed facts as to the material issues: (1) whether the "hunting license" system causes significant statistical disparities between the percentage of female applicants and the percentage of male applicants admitted into the apprenticeship program; (2) whether use of the "hunting license" system is a business necessity; and (3) if it is a business necessity, whether nondiscriminatory alternatives exist.

To the extent that women and men are admitted into the apprenticeship program at different rates, it is not contested that the differential results from use of the "hunting license" system and not from some other element of the admission process. The JATC attempts to explain why the "hunting license" system has this effect but does not dispute the existence of the effect.[6]

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[6] The JATC's experts conducted a survey of people *in the carpentry trade*, comparing men and women, to determine whether the difference in indenture rates resulted from discrimination. The decision to study the group of people who were successful at breaking into the trade is very odd given that the group at issue in this lawsuit consists of those who were excluded. For example, the fact that among those employed "86% of females found their first job within three months" is immaterial if a far greater percentage of women than men *never* found a job.

Furthermore, the JATC's experts apparently were directed to conduct their survey in conformity with the JATC's theory of the case, according to which Eldredge was attempting to hold the JATC liable for discrimination by employers. The JATC's study was directed at proving that contractors do not discrimnate against women in their hiring practices. The experts thought it significant that more men took shop classes in high school and were referred to their first job by a friend or family member. It simply does not matter, however, why requiring applicants to find their own first job selects men at a disproportionate rate—unless the reason is also a job-related requirement. In this case, neither prior training nor a journeyman relative are required. Indeed, if, for example, the JATC did require apprentice applicants to have taken high school shop classes, and if substantially fewer women than men satisfied this condition, the requirement would violate Title VII

The data on admission rates for qualified men and women into the apprenticeship program, which were supplied by the JATC, demonstrate a substantial disparity between the sexes. Aggregated over a nine-year period, women's admission rate as a percentage of women applicants was approximately fifty-four percent of men's admission rate. In absolute numbers over a nine year period 21,066 men but only 657 women were indentured.[7] The

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unless the requirement distinguished those who are competent to become carpenters from those who are not.

Because the JATC micharacterized Eldredge's complaint, its experts' conclusions as to the causes of hiring differentials, even forgiving the obvious error of excluding a necessary population from the study, simply have no bearing on the issues in this case.

[7] The data for 1976 through 1984 are as follows:

Applicants	*Indentures*
Number of Men: 54,344	Number of Men (%): 21,066 (38.8)
Number of Women: 3,140	Number of Women (%): 657 (20.9)

Analyzed year-by-year, assuming that applicants from prior years remain in the applicant pool, the data shows that women's indenture rate fluctuated between 16.09% and 64.03% of the men's rate. If it is assumed that there was no carryover of applicants from prior years, in seven of the years, women were indentured at between 17.21% and 73.34% of the male rate; in one year, the rate was 85.46% and in another 147.27%. The parties dispute whether a year-by-year analysis is necessary in this case. Although Eldredge did such an analysis, and the results demonstrate a substantial discriminatory impact for all years if a carryover is assumed and for seven of nine years with no carryover, she argues that the aggregated data alone may be relied on to prove her case. We agree. The aggregated data presents a more complete and reliable picture of the effects of the JATC's admission practices. *See Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 336 n. 17 (4th Cir. 1983), *cert. denied*, 466 U.S. 951, 104 S.Ct. 2154, 80 L.Ed.2d 539 (1984). Of course, if a year-by-year analysis demonstrated an ever-decreasing discriminatory impact, such a result should not be ignored. In this case, however, women did less well

guidelines established by the Equal Employment Opportunity Commission provide that "a selection rate that 'is less than [80 percent] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact.'" *Connecticut v. Teal*, 457 U.S. 440, 443 n. 4, 102 S.Ct. 2525, 2529 n. 4, 73 L.Ed.2d 130 (1982) (quoting 29 C.F.R. § 1607.4D (1981)); *see also Abermarle Paper Co. v. Moody*, 422 U.S. 405, 431, 95 S.Ct. 2362, 2378, 45 L.Ed.2d 280 (1975) (stating that EEOC guidelines, as interpretations of Title VII by the enforcing agency, are entitled to "great deference"); *Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1511 n. 4 (10th Cir.1987) (using the EEOC's 80% rule as an index of "substantial disparity").

Both Eldredge and the JATC employed statisticians to evaluate the "significance" of the male/female differential; that is, to test the probability that the disparity resulted from chance rather than from the challenged admission procedures. Although the statisticians disagreed as to how the data should be broken down and employed different statistical models in their analysis, both found that the disparity was statistically significant.[8] Because

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relative to men in the last two years for which data is available than they did over the nine year period as aggregated. Where, as here, "policies have remained unchanged over a period of time and there have been no substantial changes in the conditions determining thir application, it would be unreasonable to require a plaintiff to break his or her data into year by year subgroups." D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 7.1 (1986 Supp.). Accordingly, we find that the agregated data are the most probative and are certainly sufficient in this case.

[8] Eldredge's statistician, Dr. Kakigi, using a binomial model, found that for the data aggregated over nine year, there was less than one chance in ten to the eighty-third power that the disparity in indenture rates resulted from chance (12.49 standard deviations). This astronomical result, however, may be inaccurate. The overall indenture rate was .38, and use of a binomial model "when the overall selection rate is too large, e.g., more than .20, can lead

Eldredge demonstrated that use of the "hunting license" system resulted in a substantial and statistically signifi-

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to results which are substantially misleading and inaccurate." D. Baldus & J. Cole, *supra* note 7, § 9.0 (1986 Supp.).

The JATC's statistician, Dr. Thomas, found that there was one chance in fifty (.02) that the disparity resulted from chance using a matched T test and once chance in twenty-two (.045) using a sign test. These results are probably too conservative. Based on Dr. Thomas's declaration, it is clear that he did not evaluate the data as aggregated over the nine years at issue. We have determined thatt he aggregated data is the most probative in this case. *See supra* note 7.

Furthermore, it appears that Dr. Thomas's model rejected the assumption that male and female applicants had the same probability of becoming indentured. Dr. Thomas thought it significant that, among people within the carpentry trade, more men than women were referred to their first job by a friend or family member, and that, in high school, women were less interested in carpentry than were men. It would seem that Dr. Thomas's analysis was designed to test whether factors other than gender discrimination on the part of employers accounted for women being less successful at obtaining jobs. For the purposes of Eldredge's prima facie case, however, the issue is not why the "hunting license" system has a discriminatory impact, rather the issue is simply *whether* it has such an impact. To the extent that Dr. Thomas injected considerations other than the disparity in indenture rates into his model and analysis, his results would underestimate the level of statistical significance. The fact that Dr. Thomas used a matching test indicates that he broke the data down into subgroups in order to control for variables. *See* D. Baldus & J. Cole, *supra* note 7, § 7.0-7.2 (1980 & 1986 Supp.). In general, "the plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies." *Id.* § 7.1 (1986 Supp.). Here, there simply are no subgroups. All applicants, male and female, meet the age and education requirements for admission into the program and should thus be presumed to have an equal chance to be indentured.

It thus appears that neither statistician accurately tested the level of statistical significance—Dr. Kakigi's figures are too high and Dr. Thomas's are too low. However, even Dr. Thomas's lowest figure, once chance in twenty-two (.045) is sufficient to give rise to an inference that the "hunting license" system rather than

cant disparity between male and female indenture rates, she established her prima facie case of discrimination.

The burden shifted to the JATC to prove that the "hunting license" system is a business necessity. To establish business necessity, the JATC claims that their system is both job-related and necessary to the efficient operation of the apprenticeship program.

Even if we assume that requiring apprentices to have a job in the industry is a business necessity (because the classroom training is more effective when combined with hands-on experience),[9] the JATC has neither argued nor produced evidence that use of the "hunting license" system to satisfy the first-job requirement is itself a business necessity. Indeed, such would be the case only if one's ability to find a job were an accurate measure of one's ability to learn the carpentry trade. *See Contreras*, 656 F.2d at 1271 (To be job-related, a screening device must "actually measure[] skills, knowledge, or ability required for successful performance of the job."). Obviously it is not. Nor has the JATC argued that the "hunting license" system is the only way in which the first job requirement can be satisfied. Such an argument would be futile given that an alternate method—numerical referral from the new applicant referral list—is already in place.[10] *See*

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chance is responsible for women's lower indenture rates. *See Segar v. Smith*, 738 F.2d 1249, 1283 (D.C.Cir.1984) (holding that the .05 level of significance is "certainly sufficient to support an inference of discrimination"), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985).

[9] Eldredge argues that the JATC's practice of permitting indentured apprentices to remain in the program if they become unemployed belies the claim that the first-job requirement is a business necessity.

[10] While ordinarily we would require plaintiffs to show that the alternate method would be both effective and nondiscriminatory, we do not think that such proof is essential here. The alternate method is an established procedure set forth in the collective bargaining agreement. Since plaintiffs, the injured parties, are willing to accept the contractually established alternate method, we think

supra at 1340. Furthermore, requiring apprentice applicants to find their own jobs or allowing employers to select their own apprentices is at odds with the hiring-hall system that, under the Carpenters Master Agreement, employers must use to fill most of their non-apprentice hiring needs. Thus, the JATC has not demonstrated business necessity with a showing of apprenticeship-relatedness in the sense of showing that it is essential to hire apprentices in a different manner than journeymen are hired.

In support of its "business necessity" defense, the JATC also submitted the declaration of JATC officer Gordon Littman. Littman convincingly explained why the JATC cannot and should not accept all those who apply into the apprenticeship program—it lacks the resources to train them and there are not sufficient apprenticeship positions in the industry to accommodate all applicants. The district court found, based on Littman's declaration, that the "first job" requirement was based on a "legitimate business reason." *Eldredge III*, No. C75-0262-J.P.V. at 4. Apart from the fact that a "legitimate business reason"

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it fair to presume that it will be utilized in an effective and non-discriminatory manner.

As we previously held in this case:

> JATC may not avoid its own liability for practices illegal under Title VII by relying on the employers' possible future conduct that might frustrate the remedial purpose of any court-ordered changes in the apprenticeship program. . . .
>
> . . . There is no evidence [that the employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC in this suit.] On the contrary, the employers have previously participated, apparently successfully, in a state-mandated affirmative action program designed to increase the number of minority apprentices.

Eldredge v. 46 N. Cal. Counties Joint Apprenticeship and Training Committee, 662 F.2d 534, 537 (9th Cir.1981).

is not the same thing as a "business necessity," [11] the district court (and Littman) failed to recognize that Eldredge is *not* seeking to have *all* applicants accepted into the program and that alternatives to the "hunting license' system are equally capable of appropriately limiting the number of indentured apprentices.[12] In short, the JATC produced no evidence that the "hunting license" system is a business necessity that must be employed to limit the number of carpentry apprentices.

Because a showing that the "hunting license" system is a business necessity is an essential element of the JATC's case on which it would bear the burden of proof at trial, the JATC's failure to adduce proof on this issue entitles Eldredge to judgment against the JATC on the issue of liability—the JATC is violating Title VII as a matter of law. *Celotex*, 106 S.Ct. at 2553; *cf. Martinez v. United States*, 669 F.2d 568, 570 (9th Cir.1981) ("Under proper circumstances, an appellate court may order the district court to enter summary judgment for the non-moving party.").

CONCLUSION

The district court's grant of summary judgment to the JATC is REVERSED. The case is REMANDED for entry of summary judgment for the plaintiff class on the issue of Title VII liability based on the JATC's use of the "hunting license" system and for trial to determine the appropriate remedy.

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[11] *See Atonio*, 827 F.2d at 442 ("Business necessity means more than a business purpose.").

[12] Eldredge suggests that the first-job requirement could be eliminated, and qualified applicants indentured on a first-come-first-served basis. Indentured apprentices are eligible for job referrals through the union hiring hall. If the first-job requirement were retained, Eldredge suggested that the alternative method of numerical referrals from the new applicant referral list would serve the purpose of limiting the number of admittees and at the same time cure the discriminatory impact of the "hunting license" system.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-4482

LINDA ELDREDGE and CHRISTINE A. MAZUR,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES
JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted March 11, 1981
Decided Nov. 4, 1981
As Amended on Denial of Rehearing and
Rehearing En Banc Feb. 8, 1982

Before FLETCHER and NELSON, Circuit Judges, and KEEP,* District Judge.

FLETCHER, Circuit Judge:

This is an appeal from the district court's order dismissing the action for failure to join indispensable par-

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* The Honorable Judith N. Keep, United States District Judge for the Southern District of California, sitting by designation.

ties. Fed.R.Civ.P. 19.[1] The opinions are reported at 83 F.R.D. 136, 20 Fair Empl.Prac.Cas. 897 (N.D.Cal.1979) and 440 F.Supp. 506 (N.D.Cal.1977). We reverse and remand.

I

FACTS

The facts underlying this suit are recounted in great detail in the district court opinion, 440 F.Supp. at 510-14,

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[1] Rule 19 provides in pertinent part:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

and need only be summarized here. Plaintiffs Eldredge and Mazur brought suit under Title VII, 42 U.S.C. § 2000e-2, against the Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee (JATC), alleging sex discrimination in the operation of JATC's apprenticeship program. Plaintiffs brought the suit as a class action, but the district court has not yet considered the question of class certification.

Defendant JATC is a joint labor-management committee established under an agreement that provides for a trust fund contributed to by the parties to the master collective bargaining agreements in the Northern California construction industry. JATC is composed of equal numbers of labor and management representatives, and acts as a board of trustees for the administration of the Carpenters Apprenticeship and Training Trust Fund for Northern California. It is responsible for establishing, supporting, and maintaining programs to educate and train, journeymen and apprentices in all classifications covered by any collective bargaining agreement that requires employer contributions to the trust fund. 440 F. Supp. at 510-11.

Plaintiffs allege that the process by which JATC selects applicants to its apprenticeship training program discriminates against women. Although JATC has employed other selection procedures in the past, *see id.* at 511-12, it presently relies on what is known as the "unrestricted hunting license" system. Under this system, an individual must first convince an employer to hire him or her as a beginning apprentice. JATC then places the individual's name on its appllcant register. *Id.* at 512. The applicant enters into an apprenticeship agreement with JATC and is dispatched through the union hiring hall. *Id.* An individual needs no prior training to become an apprentice; all that is required is that he or she be 17 years of age and have a high school diploma or its equivalent. *Id.* at 511.

The master collective bargaining agreements under which JATC operates require employers to hire one apprentice for every five journeymen employed. The apprenticeship is a four-year program. Employers are under no obligation to hire beginning as opposed to experienced apprentices. *Id.* at 519. In May of 1976, only thirteen of JATC's 3220 registered apprentices were women. *Id.* at 514.

The essence of plaintiffs' complaint is that, by relying on the unrestricted hunting license system to recruit apprentices, JATC has adopted an entrance requirement for its program which is known to have a discriminatory effect on women. Plaintiffs argue that JATC knows that individual employers do not hire women under the unrestricted hunting license system, and the JATC's use of this system is therefore illegal under Title VII. The district court assumed for the purposes of its rule 19 analysis that plaintiffs had stated a claim on which relief could be granted. 440 F.Supp. at 518 (citing *Crockett v. Green*, 388 F.Supp. 912 (E.D.Wis.1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976)).

The district court held that the 4500 employers and 60 union locals covered by the master labor agreement, or adequate representatives of their interests, were indispensable to the litigation under the standards imposed by rule 19(b).[2] It ordered them joined within 60 days. 440 F. Supp. at 527. Plaintiffs were granted extensions of time in which to explore the possibilities for joinder, *see*, 83 F.R.D. 136, 20 Fair Empl.PracCas. at 898-99, but joinder of all 4500 employers proved impossible. The plaintiffs then sought to join the Northern California Homebuilders' Conference (NCHBC) to represent the absent

[2] The trial court also decided two issues not raised in this appeal. It held that the plaintiffs had exhausted their administrative remedies, 440 F.Supp. at 515-18, and that the absent parties could be joined even though they were not named in the charge to the EEOC, *id.* at 524-26.

employers' interests.[3] The court held this inadequate and dismised the case. *Id.* at 900, 83 F.R.D. 136.[4] We conclude that the employers are not necessary parties under rule 19(a) and thus cannot be indispensable parties under rule 19(b). We reverse.

II

ANALYSIS

Rule 19 requires two separate inquiries. First, are there persons who should be joined, either because their own interests or the interests of the parties might be harmed by their absence? Such persons, referred to as "necessary parties," must be joined if feasible. Fed.R. Civ.P. 19(a). Second, if parties determined to be necessary under rule 19(a) cannot be joined, should the action in "equity and good conscience" be dismissed? Only if the court determines that the action should be dismissed is the absent party labelled "indispensable." Fed.R.Civ.P. 19(b); *see English v. Seaboard Coast Line Railroad*, 465 F.2d 43, 48 (5th Cir. 1972).

The nature of the rule 19 inquiry is described at some length in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). The inquiry should focus on the practical effects of joinder and nonjoinder. *Id.* at 116 n.12, 88 S.Ct. at 741 n.12; *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874

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[3] The NCHBC is a large employers' organization which negotiated the master labor agreement under which JATC operates. Not all of the employers who subscribe to the master agreement belong to the NCHBC. 83 F.R.D. 136, 20 Fair Empl.Prac.Cas. at 899.

[4] The plaintiffs also sought to join the United Brotherhood of Carpenters and Joiners of America, the international, to represent the union locals. The district court did not decide whether the international could adequately represent the locals because it decided that the action could not proceed in any case. 83 F.R.D. 136, 20 Fair Empl.Prac.Cas. at 899 n. 4.

(5th Cir. 1970). Rule 19 was revised in 1966 to emphasize its practical focus and to avoid the inflexible approach taken by many courts under the prior version of the rule. *Id.* at 871-74; *see Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. at 106-07, 88 S.Ct. at 736-37.

Rule 19(a) describes two categories of persons who should be joined if feasible. If the absent employers fall into either of these two categories, they are "necessary parties."

The first category comprises those persons in whose absence "complete relief cannot be accorded among those already parties." Fed.R.Civ.P. 19(a)(1). This portion of the rule is concerned only with "relief as between the persons already parties, not as between a party and the absent person whose joinder is sought." 3A Moore's Federal Practice ¶ 19.07-1[1], at 19-128 (2d ed. 1980); *accord, Morgan Guaranty Trust Co. v. Martin*, 466 F.2d 593, 598 (7th Cir. 1972). The district court concluded that the absent employers could frustrate any relief granted against JATC, and that complete relief would therefore not be possible unless the employers were made parties. The court reasoned that the employers could defeat any order against JATC by refusing to hire any apprentices, by hiring only unregistered, nonunion apprentices or by rejecting all female apprentices dispatched to them. 440 F.Supp. at 519-20. We believe that the district court misapprehended the legal inquiry required by rule 19(a)(1).

If JATC's activities violate Title VII, a question not yet decided, then the court has both the power and the duty to enjoin those activities. The possibility that such an injunction may induce employers to avoid JATC's services, or ultimately to disband the training and referral system altogether, should not defeat the present action against JATC. JATC may not avoid its own liability for practices illegal under Title VII by relying on the

employers' possible future conduct that might frustrate the remedial purposes of any court-ordered changes in the apprenticeship program. *See, e.g., United States v. Sheet Metal Workers Local 36*, 416 F.2d 123, 132 & n.16 (8th Cir. 1969) (enjoining union from continuing discriminatory referral practices, even though those practices were required by collective bargaining agreement with absent employers).

The district court appears to assume that the employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC in this suit. There is no evidence to this effect in the record. On the contrary, the employers have previously participated, apparently successfully, in a state-mandated affirmative action program designed to increase the number of minority apprentices. *See* 440 F.Supp. at 511-12.

While it might be desirable to join all 4500 employers in order to eradicate sex discrimination in the industry, we conclude that relief on plaintiffs' claims against JATC as an entity could be afforded by an injunction against JATC alone. Both sides agree that JATC has the power under the trust fund agreement to structure its apprenticeship program in any way it sees fit. 440 F.Supp. at 510-11. It is quite possible that a court-ordered restructuring of the program could effectively increase the participation of women in the apprenticeship program. *See, e.g., EEOC v. Local 638, Sheet Metal Workers' Union*, 565 F.2d 31, 34-35 (2d Cir. 1977).

The second inquiry required by rule 19(a) concerns prejudice, either to the absent persons or to those already parties. Rule 19(a)(2)(i) provides that a person should be joined if he claims an interest relating to the subject of the action, and the disposition of the action may "as a practical matter impair or impede his ability to protect that interest."

The district court held that the employers should be joined since they have a right to select their own employees, a substantial interest that they have a right to protect.[5] We disagree. The trust fund agreement grants full authority to JATC to structure the apprenticeship program and to select the apprentices. We conclude that the employers have by contract ceded to JATC whatever legally protectible interest they may have had in selecting apprentices to be trained. On the other hand, without the joinder of the employers, any court order that may be entered to enjoin JATC to institute programs cannot go beyond the authority granted JATC under the trust fund agreement. The absent employers are thus assured that an injunction against JATC will not trench on any rights reserved to the employers under the agreement. We must conclude that the employers' ability to protect whatever interest in employee selection they retain will not be "impaired or impeded" if they are not made parties. They are therefore not necessary parties under rule 19 (a)(2)(i).

The district court was understandably concerned that the absent employers might have interests that would be unrepresented in the present suit. Although we have concluded that their interests are not the sort that would make the employers necessary under rule 19, on remand it is possible that some employers, or the NCHBC, may move to intervene. The district court may then consider whether to permit intervention under Fed.R.Civ.P. 24.[6]

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[5] The district court did not find the employers necessary under rule 19(a)(2)(ii). *See* 440 F.Supp. at 522-24.

[6] Fed.R.Civ.P. 24 provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the

See e.g., United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed2d 187 (1976).

We hold that the trial court erred in dismissing the case for nonjoinder of necessary parties. We REVERSE and REMAND for further proceedings.

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action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

APPENDIX B

[Filed Jan. 17, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-75-2062 C.A.L.

LINDA ELDREDGE, on behalf of herself and on behalf of all others similarly situated,
Plaintiffs,

vs.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendants.

INTERIM ORDER IMPLEMENTING RELIEF

This matter came on regularly for hearing on January 17, 1997. The Court, having considered the arguments of counsel, the pleadings and paper on file herein, and good cause appearing therefor,

IT IS HEREBY ORDERED that the mandate [1] of the United States Court of Appeals for the Ninth Circuit,

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[1] The district court was instructed to order within sixty days the following: "eliminate the hunting license system, require all applicants to use the sequential referral list to satisfy the first-job requirement, implement a 20% affirmative action program, and appoint a monitor" and to reconsider the merits of additional remedies proposed by plaintiffs, including a class for all apprentices regarding work place harassment and discrimination. The district court was further instructed to "in due course order such additional remedies as it deems helpful or necessary and consistent with the relief herein granted to achieve the expressed goals." *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 94 F.3d 1366 at 1372 (9th Cir. 1996).

issued on September 9, 1996, in *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 94 F.3d 1366 at 1372 (9th Cir. 1996) shall be implemented as follows:

Replacement of Hunting License Indenture System By Indenture After Sequential Referral From JATC New Applicant Referral Lists

1. On May 1, 1997, the JATC shall be permanently enjoined from using the hunting license system and on that date the hunting license system shall be eliminated. Beginning on May 1, 1997, applicants to the JATC carpentry apprenticeship program will obtain their requisite first jobs with union contractors by sequential referral by the JATC from JATC new applicant referral lists, as specified below. Applicants who secure such first jobs will be promptly indentured by the JATC.

2. On April 15, 1997, all existing permanent applicant registers shall expire and registration for new applicant referral lists shall begin.

3. There shall be no more than five new applicant referral lists. Each such referral list shall cover a specific JATC district office and a defined geographical area and each such referral list shall be maintained by a particular JATC office. No later than April 1, 1997 the defendant shall provide plaintiffs' counsel in writing, with respect to each separate new applicant referral list, the name, address and telephone number of the JATC entity responsible for maintaining that referral list and a definition of the geographical area covered by that referral list. If for any new applicant referral list there is more than one location at which an applicant can sign the list, or more than one location from which an applicant can be referred from that list, the JATC will provide in writing to plaintiffs' counsel no later than April 1, 1997, all pertinent information concerning each such new applicant referral list.

4.a. *Listing on New Applicant Referral Lists.* The parties have not agreed to the language of paragraph 4.a. and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the process by which applicants' names will be listed on new applicant referral lists.

4.b. *Distribution of Applications and Written Information Concerning Defendant's Program.* The parties have not agreed to the language of paragraph 4.b. and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the contents and timing of the distribution of written information to applicants concerning defendant's program and the Monitor.

4.c. *Information to Appear on Apprentice Applications and New Applicant Referral List.* The JATC shall use a printed form for apprentice applications which shall include the following information: the name, sex, address, and telephone number of the applicant as well as the applicant's signature. In addition, each applicant shall have the opportunity when he or she signs the apprentice application to record on the application that he or she is willing to work at all locations within the geographical area of that referral list or at specific locations within the geographical area of that referral list. All of the foregoing information regarding each applicant shall also appear on the applicable new applicant referral list. In addition, the new applicant referral list shall state the date and time that the JATC registered the applicant on the list.

5. If any applicant informs the JATC in writing after he or she has signed a referral list of a change in his or her address and/or telephone number, the JATC shall

promptly enter the updated information on the referral list by the applicant's name.

6. Women shall be recruited for the referral lists in the manner specified under the Recruitment of Female Applicants section of this Order.

7. On each May 1, subsequent to May 1, 1997, each new applicant referral list shall be purged of applicants who have been on that referral list for at least two years, but who have not been indentured.

Referral of Applicants For Dispatch; Affirmative Action Indenture Goals

8. Beginning on May 1, 1997, from each new applicant referral list, defendant shall refer applicants to the appropriate Carpenters' local union or District Council, as the case may be (hereinafter jointly referred to as the "Union"), for dispatch, in the following manner and in no other manner, other than as specified in paragraph numbers 18 and 19 below:

9. A "referral" is defined herein as the referral of one applicant to a Union, which has placed an order for one or more applicants. A referral occurs when the JATC communicates the referral to an applicant and the applicant agrees to accept the referral. Upon dispatch to a subscribing employer by the Union, and upon hire by the subscribing employer, the applicant shall be indentured as an apprentice.

10. The first four referrals on each new applicant referral list shall be offered by the JATC to applicants in the order of their numerical sequence listing on that new applicant referral list.

11. In the event that at least one or the first four referrals results in a woman being referred the fifth referral shall, also, be offered by the JATC to applicants in the order of their numerical sequence listing on that new applicant referral list.

12. In the event that none of the first four referrals results in a woman being referred the fifth referral shall be offered by the JATC to the woman whose name appears next in numerical sequence on that new applicant referral list; if that woman for any reason does not accept the refrerral, the referral shall continue to be offered in numerical sequence to the next woman on that referral list until a woman accepts the referral or until each woman on that referral list has refused to accept the referral.

13. Thereafter each series of five referrals shall be offered to applicants in accordance with paragraphs 10 through 12 above.

14. If any applicant is referred but the union does not dispatch that applicant or the employer does not hire that applicant, the applicant shall retain his or her numerical placement on the applicable new applicant referral list.

15. With respect to referrals under paragraph 12 above, if the union does not dispatch that applicant or the employer to whom a woman is referred does not hire that woman, the JATC, if it is notified of the refusal to dispatch or to hire, shall offer the next available referral to that woman. If that woman does not accept the referral, the referral shall be offered to women in the manner described in paragraph 12 above.

16. The parties have not agreed to the language of paragraph 16 and each side shall submit their proposal to the Court no later than January, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the affirmative action goal which will trigger the end of the affirmative action requirements of this Order.

17. The JATC shall communicate all referrals to affected, listed applicants by telephone between the hours of 7:00 a.m. and 9:00 a.m. on weekdays. If an applicant is not present when the JATC telephones him or her to

communicate a referral, the applicant's absence shall be deemed a refusal of a referral. After an applicant has refused three (3) referrals, the applicant's name shall be dropped from the applicable new applicant referral list, and the JATC shall notify the applicant by mail that he or she has been dropped from the list, and that he or she may re-sign the list and receive a new numerical sequential number if he or she is still interested in receiving referrals from the list.

Referrals of Applicants for Specific Contracts Involving Public Works

18. Where Federal, State, Local or other governmental Public Work rules, regulations, policies, resolutions and/or ordinances, applicable to the specific contract and project area, pertain to Affirmative Action employment and/or training of apprentices and are imposed on a subscribing employer as a contractual obligation, the JATC will refer applicants to the Union for dispatch to the employer subject to such a contractual obligation between the employer and the awarding body (owner):

a. From the applicable new applicant referral list, in the order of their numerical sequence listings on said list, those minority and women applicants as are residents of the community in question. In the event that none of the first four referrals of such applicants results in a woman being referred, the fifth referral shall be offered by the JATC to the woman who is a resident of the community in question whose name appears next in numerical sequence on the applicable new applicant referral list; in the event that woman for any reason does not accept the referral, the referral shall continue to be offered in numerical sequence to the next woman resident of the community in question on that referral list until a woman accepts the referral, or until each woman resident of that community on that list has refused to accept the referral.

b. The JATC shall ask a subscribing employer operating under such a contractual obligation to provide a copy to the JATC of the contract and of the Federal, State, Local or other governmental Public Work rule, regulation, resolution and/or ordinance that requires the employment and/or training of minority and/or women community resident apprentices. Documents so provided by such a subscribing employer shall be maintained by the JATC and the JATC shall maintain all additional records which establish the bona fides of such referrals. All such records shall be made available for inspection by the Monitor. The JATC shall check the "paragraph 18 exceptions box" on the request for referral daily log and on the applicant contacts daily log when a referral is requested, offered, or refused which involves referral on a public works contract.

Exception for Newly Subscribing Employers

19. Employers, who upon signing a collective bargaining agreement in the Carpentry trades for the first time (that is, a newly-subscribing employer who was formerly non-union), may request to have designated employees currently on its payroll enter the JATC apprenticeship program as registered apprentices. Under such circumstances the new applicant referral lists and the provisions of paragraph 10 through 17 above do not apply to said newly subscribing employer's current employees. The JATC will maintain a paragraph 19 exception letter concerning each apprenticeship indentured under the terms of this exception. The JATC shall maintain all records necessary to establish the bona fides of any such newly subscribing employer's request to have its current employees registered as apprentices in the JATC program, and the JATC shall make such records available for inspection by the Monitor.

"Reindentured" and "Transferred" Apprentices

20. "Reindentured" apprentices or "transferred" apprentices, as defined below, if legitimately made, will not be referred from any JATC new applicant referral list and will not be subject to the referral procedures specified in paragraphs 10 through 17 above:

a. A "reindenture" occurs when a "cancelled" apprentice whose apprenticeship agreement has been cancelled (usually due to disciplinary proceedings) seeks to be reindentured into the defendant program and is reindentured; JATC records maintained of such cancelled and reindetured apprentices include the apprentice's original (and first) apprentice agreement, disciplinary records concerning the apprentice and the reindenture agreement. The JATC shall maintain all records necessary to establish the bona fides of any apprentice reindentured under such circumstances and shall make such records available for inspection by the Monitor.

b. A "transferred" indenture occurs when an apprentice already indentured in an established United Brotherhood of Carpenters & Joiners of America apprenticeship program seeks to exercise his or her right to transfer his or her apprenticeship indenture to the defendant program. JATC records maintained of such transferred apprentices includes the apprentice's records from the transferring program and any and all actions taken by the accepting apprenticeship program. The JATC shall maintain all records necessary to establish the bona fides of any apprentice transferred under such circumstances, and shall make them available for inspection by the Monitor.

c. A "reindenture" occurs when an apprentice who has "self-terminated" his or her apprenticeship seeks to reindneture in the defendant program and whose request is granted. The JATC records maintained of such self-terminated and reindentured apprentices include the apprentice's original (and first) apprentice agreement, the

reindenture agreement, and record showing any and all actions taken by the JATC. The JATC shall maintain all records necessary to establish the bona fides of any apprentice reactivated under such circumstances, and shall make them available for inspection by the Monitor.

Notification to Applicants on Permanent Applicant Registers of Changes in Indenture Procedures

21. No later than March 15, 1997, the JATC shall notify all current applicants on the JATC's existing permanent applicant registers of the approaching changes required by this Order. The parties shall meet and confer to agree on the language of such notices to current applicants.

Record Keeping and Provision of Records to Monitor

22. *Provision of Complete Copies of New Applicant Referral Lists.* On April 30, 1997, the JATC shall provide the Monitor a complete current copy of each new applicant referral list. The JATC shall provide the Monitor such copies by personal delivery, by FAX or by first-class mail.

23. *Weekly Reports on Indentures.* Beginning on May 7, 1997, and continuing for 90 days thereafter, on the first working day of each week, the JATC shall provide the Monitor in writing, separately for each new applicant referral list, the name, sex, telephone number and the date of indenture of each applicant who was indentured during the previous week and the request/referral number which resulted in that applicant's indenture. After passage of the 90 day period the parties will meet and confer regarding the possibility of changing the period from weekly to monthly of the JATC's provision of such indenture reports. All such indenture lists and reports shall be provided by the JATC to the Monitor by personal delivery, by FAX or by first-class mail.

24. *Daily Logs.* For each new applicant referral list, the JATC shall maintain a "Request for Referral Daily Log" and an "Applicant Contacts Daily Log." The JATC shall use a form for the Request for Referral Daily Log that is substantially similar to the form attached hereto as Exhibit B and shall use a form for the Applicant Contacts Daily Log that is substantially similar to the form attached hereto as Exhibit C. The JATC shall maintain these logs as follows:

25. *Request for Referral Daily Log.* At the time a request for the referral of an applicant is received by the JATC, an entry shall be made on the "Request for Referral Daily Log." The entry shall give the date and time of the request and the same and telephone number of the Union entity making the request. A sequential number shall be assigned to the request, hereinafter referred to as the "request/referral number." A request for the referral of multiple applicants shall be given multiple numbers. A request for referral under paragraph 18 above, shall be noted on the request for referral daily log. The first such request received on each new applicant referral list shall bear the number "1" preceded by the year (i.e., "1997-1") and subsequent requests shall be assigned consecutive numbers. Thereafter, at the beginning of each new calendar year, sequential numbering of requests for referrals on each new applicant referral list shall begin at number "1," preceded by the year, subsequent requests shall be assigned consecutive numbers.

26. *Applicant Contacts Daily Log.* At the time the JATC telephones an applicant concerning a referral an entry shall be made in the "Applicant Contacts Daily Log." The entry shall state the name, sex and telephone number of the applicant who was telephoned, and the date and time the applicant was telephoned. Next to the applicant's name, the request/referral number shall be listed. A request for referral under paragraph 18 above, shall be noted on the applicant contacts daily log. The

results of the phone call shall also be entered in the Applicant Contacts Daily Log; that is, whether the applicant accepted or rejected the referral, and any reasons stated by the applicant for rejecting it. If the applicant was not reached when called, that should be recorded on the Daily Log as a refusal to accept the referral as provided for in paragraph 17 above.

27. Each entry on the Daily Logs shall be made by the JATC employee who made or received the call.

28. The parties have not agreed to the language of paragraph 28 and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the duration of time that the JATC will maintain original copies of the Daily Logs.

29. *Weekly Provision to Monitor of Copies of Daily Logs.* Beginning on May 7, 1997, and continuing for 90 days thereafter on the first working day of each week, the JATC shall make copies of each of the Request for Referral Daily Logs and each of the Applicant Contacts Daily Logs from the previous week. That same day the JATC shall provide copies of each such Daily Log to the Monitor either by personal delivery, by FAX or by first-class mail. After passage of the 90 day period the parties will meet and confer regarding the possibility of changing the period from weekly to monthly of the JATC's provision to the monitor of such documents.

30. *Additional Information To be Recorded on New Applicant Referral Lists.* In addition to the applicant information required by paragraphs 4 and 5 above, the JATC shall record on each new applicant referral list, adjacent to the applicant's name, in separate columns, the following information: (1) when an applicant's name is dropped from a new applicant referral list in accordance with paragraph 17 above, the date and time that the

applicant's name was dropped and the initials of the person crossing out the name shall be entered; (2) when an applicant is indentured, the date of indenture shall be entered; (3) whether an applicant is indentured pursuant to an exception contained in paragraphs 18, 19 or 20 of this Order and, if so, pursuant to which exception; and (4) if an employer declines to hire an applicant dispatched to it or if a union refuses to dispatch an applicant referred to it, the time and date the JATC learned of the failure to dispatch or hire.

31. *Weekly Provision of Copies of Updated Pages of New Applicant Referral Lists.* Beginning on May 7, 1997, and continuing for 90 days thereafter, on the first working day of each week, the JATC shall make a copy of each page from each new applicant referral list on which any entries were made during the previous week. That same day the JATC shall provide copies of such pages to the Monitor either by personal delivery, by FAX or by first-class mail. After passage of the 90 day period the parties will meet and confer regarding the possibility of changing the period from weekly to monthly of the JATC's provision to the monitor of such documents.

32. The original copies of all applicants' applications for apprenticeship and of all New Applicant Referral Lists shall be permanently maintained by the JATC.

33. *Annual Provision of Data Re: Male/Female Apprentices.* The parties have not agreed to the language of paragraph 33 and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the annual provision of statistical data to the Monitor concerning male/female indentured apprentices.

Recruitment of Female Applicants

34. No later than March 15, 1997, the JATC shall send a notice to various local, state and federal government offices, private institutions, schools and women's organizations explaining the procedures to become an indentured apprentice and the affirmative action referrals of women that will occur as a result of this Order, and stating the name, address and telephone number of the female Monitor appointed by this Court. The parties shall meet and confer concerning the list of entities to whom such notice shall be sent and concerning the language of said notice.

35. Efforts shall be made to locate radio stations and television stations which may carry such notices as public service announcements.

36. No later than March 25, 1997, the JATC shall place notices in the classified ads, Help Wanted or Job Opportunities sections of newspapers throughout the 46 northern California counties concerning apprenticeship opportunities for women. The defendant shall inform plaintiffs' counsel in writing of the newspapers which will contain such notices. The language of such notices shall be agreed to by the parties. These ads shall be in-column and at least one and one-half inches in length. Such ads shall be run in specified newspapers for seven consecutive days.

37. The JATC is ordered to engage in recruitment efforts, including but not limited to those specifically ordered herein, that are designed to increase the number of women indentured into its apprenticeship program.

38. As part of its efforts to recruit women applicants the JATC shall appear at those job fairs which prospective female applicant apprentices are likely to attend. Such job fairs are ones held at high schools, community colleges and community-based organizations. The JATC shall pay a woman apprentice or journeylevel carpenter

at her appropriate collective bargaining wage rate to attend the job fair and to address persons who attend the fair about opportunities for women in the carpentry trade.

39. If any full year elapses following April 1, 1997 during which women constitute less than 20% of those indentured during that year, additional recruitment measures may be ordered by the Court.

Appointment of a Monitor

40. The parties have not agreed to the language of paragraph 40 and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the submission of names to the Court of individuals qualified to serve as a Monitor.

41. The Monitor's tenure shall begin no later than March 15, 1997, so that monitoring of the relief ordered herein may commence promptly.

Duties of the Monitor

42. To insure that applicants are being referred to the Union from defendant's new applicant referral lists in accordance with the terms of this Order and that such lists are being maintained in accordance with the terms of the Order, the Monitor shall be furnished regular reports, pursuant to paragraphs 23, 29, 30, 31 and 33 regarding each of defendant's new applicant registers, as required by paragraphs 18 through 28 above. In addition, the Monitor will review all other data which the JATC is obligated to provide the Monitor under the terms of this Order.

43. The Monitor shall review all JATC apprenticeship literature (including booklets, manuals, books, instructions, videotapes, films, etc.) emanating from the JATC to applicants to see whether such literature contains male-

only references either in words and/or in pictures. The Monitor shall make recommendations, if necessary, regarding changes in such literature.

44. The Monitor shall monitor the JATC's efforts to recruit women.

45. The Monitor shall visit JATC offices to review procedures related to this Order followed at each such office and to review any JATC records related to this Order, including but not limited to the originals of records specified within this Order.

46. The parties have not agreed to the language of paragraph 46 and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the Monitor's investigation of complaints of sex discrimination.

47. The parties have not agreed to the language of paragraph 47 and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is whether the Monitor's duties include interviewing women applicants and whether the Monitor will maintain the identities of such applicants in confidence.

48. The parties have not agreed to the language of paragraph 48 and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the frequency at which the Monitor will issue and file written reports with the Court.

49. The Monitor shall not disclose any of the material she reviews to any persons other than Plaintiffs' counsel and the Court since such materials constitute proprietary

material of the JATC and, should the Monitor or Plaintiffs' counsel file with the Court copies of any of the materials reviewed by the Monitor, all such copies shall be filed under seal.

50. If the parties meet and confer and are unable to resolve any problem(s) or difference(s) that may arise concerning implementation of this Order or of any subsequent orders, counsel for either side may move the Court to issue an order concerning such problem(s) or difference(s). If a dispute arises of sufficient urgency to cause either party to apply for a temporary restraining order and/or for the issuance of a preliminary injunction, there is no requirement that the parties meet and confer prior to filing for such temporary and/or preliminary relief. Counsel for either side may move the Court to amend this Order in a manner which will further the goals set out by the Ninth Circuit in its mandate.

Apprentice Class Session Concerning Discrimination and Harassment

51. The JATC shall incorporate into its carpentry classroom curriculum at least one four hour class session concerning on-the-job discrimination, in which all apprentices shall be provided information about various forms of sex, race and national origin discrimination in employment. Apprentices shall be informed that sex discrimination and sexual harassment are illegal and shall not be tolerated by the defendant. The Monitor may attend the class session and/or make a presentation by video to the class concerning employment discrimination.

Notification to Employers and Unions of Changed Indenture Procedures

52. No later than April 1, 1997, the JATC shall send a written notice to all local Carpenters' unions that dispatch applicants to the JATC's apprenticeship program to jobs and to all subscribing individual employers and

employer organizations. The notice shall describe the changes in the indenture process mandated by this Order and the timetable for such changes. The notice shall also inform such entities that sex discrimination and sexual harassment of women applicants for apprenticeship is illegal.

53. The parties have not agreed to the language of paragraph 53 and each side shall submit their proposal to the Court no later than January 24, 1997, after which the Court will modify this Order to include the language which it deems appropriate. The subject matter of this paragraph is the rights of the parties to petition the Court to terminate the affirmative action requirements of this Order.

Dated: Jan. 17, 1997

/s/ Charles A. Legge
United States District Judge

[Filed Sep. 9, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-75-2062-JPV

LINDA ELDREDGE, *et al.*,
Plaintiffs,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

Trial without a jury regarding remedial relief consistent with the Order of the Ninth Circuit was held before this Court on May 13-15, 1992, and June 4, 5, and 7, 1992. Alberta Blumin appeared on behalf of the plaintiffs and Victor Van Bourg, Robert Hirsch, Lawrence Kay, and Wesley Sizoo appeared on behalf of the defendant.

This Court heard oral testimony, examined documentary evidence, considered the arguments of counsel, and reviewed the written memorandum of the parties. Having duly considered all material and testimony submitted, this Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT [1]

1. The JATC is a joint labor-management committee, within the meaning of 42 U.S.C. § 2000E-2(d), established in 1963 pursuant to a collective bargaining agreement, governing the terms and conditions of employment in the union carpentry industry for the 46 Northern California Counties. The JATC is responsible for administering the carpentry apprenticeship program throughout forty-six Northern California counties.

2. The JATC is not, and has never been, a party to any collective bargaining agreement governing the employment of union carpenters in the 46 Northern California counties.

3. The wages and benefits for apprentices in the JATC program and employed in the union carpentry trade are, and have been at all relevant time periods, set forth in various collective bargaining agreements governing employment in the carpentry industry in the 46 Northern California Counties.

4. The JATC does not, and has never, employed either apprentices or journey carpenters, nor has the JATC ever had any authority over the hiring, dispatch, job referral, wage payments or termination of apprentice employees by union carpenter contractors.

5. The 46 Northern California Counties Master Agreement provides that individual employers shall have the exclusive right to select and hire, and that individual employers retain the right to reject any job applicant.

6. The viability and success of the union carpentry industry in Northern California depends on the immediate and continued availabiilty of a qualified pool of trained and experienced carpenter employees who are available for employment in the construction industry.

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[1] If any finding of fact is a conclusion of law, it is to be construed as such.

7. After becoming indentured, all apprentices are eligible for dispatch to jobs through union carpentry hiring halls from apprentice out-of-work lists maintained at the hiring halls at various locations throughout Northern California pursuant to the applicable carpentry collective bargaining agreements.

8. The JATC program of instruction has a duration of four years and requires a minimum of twelve hundred hours per year of employment for advancement through each stage of its program of instruction, in conjunction with classroom, supplemental and related training.

9. The plaintiff class consists of women who actually applied for admission to the apprenticeship program between 1975 and 1990 and were successful in gaining admission due to their inability to comply with the first job requirement as a precondition to eligibility for indenture.

10. No fact alleging discrimination against women by the JATC by deliberate or intentional conduct has been alleged or proven.

11. The method of indenture of male applicants in the program embodied in this Court's decree should have no effect on the indenture rates for female applicants in that the system applicable to female applicants in effect allows for one hundred percent rate of indenture of female applicants with concurrent availability of union hiring hall job dispatch for such female applicants.

CONCLUSIONS OF LAW [2]

1. The sole issue in this case involves the fact that women applicants have not been indentured into the Carpenters Apprenticeship Program at the same rate that male applicants have been indentured. *Eldredge v. Carpenters*, 833 F.2d 1334 (9th Cir. 1987) cert. denied, 487 U.S. 1210 (1988).

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[2] If any of these conclusions of law are findings of fact, they are to be construed as such.

2. Injunctive relief is not mandatory under Title VII, but is determined on the particular facts of each case. *Johnson v. Brock*, 810 F.2d 219, 255 (D.C. Cir. 1987). Because statistically significant proof of discrimination shows a violation of Title VII for indentureship rates into the JATC's program, injunctive relief is appropriate. *Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir. 1991).

3. Courts are, in general, less competent than those charged with maintaining day-to-day operations of a business to restructure business practices, and consequently the judiciary should proceed with care before mandating the adoption of a plaintiffs' alternative selection or hiring practice in response to aTitle VII suit. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 578 (1978).

4. Remedial relief must be carefully tailored to fit the violations found. To impose conditions on the indenture process for male applicants would result in the courts expanding the scope of the appropriate remedy, imposing an injunction which is neither narrowly tailored nor necessary for purposes of addressing the violations found in this case. *Wygant v. Board of Education*, 476 U.S. 267, 284-87 (1986); *Local 28 v. EEOC*, 478 U.S. 421, 480 (1986).

5. The affirmative relief requested by the plaintiffs, including a twenty percent (20%) indenture ration and twenty percent (20%) active apprenticeship ratio at all levels of the four year program for women, the appointment of a full-time, paid female monitor, the expanded recruitment efforts, the "bonus" payment program to increase the number of women applicants, the additional orientation and training for women apprentices, the additional recordkeeping and reporting requirements, is not narrowly tailored to address "implementation of the first-job requirement that is at issue in this case." *Eldredge*, 833 F.2d at 1335.

6. Whether court ordered affirmative action remedies are appropriate depends on the necessity for relief and the efficacy of alternative remedies, the relationship of any numerical goal to the relevant labor market, and the impact of the relief on the rights of third parties. *U.S. v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Board of Education*, 476 U.S. 267 (1986); *McKenzie v. Kennickell*, 825 F.2d 429 (D.C. Cir. 1987).

7. Plaintiffs proposed remedies, as outline immediately above, are not necessitated by the underlying facts and the efficacy of alternative remedies.

8. The Ninth Circuit has previously recognized the availability of an employment dispatch procedure under the collective bargaining agreement a procedure that the plaintiffs "are willing to accept." *Eldredge*, 833 F.2d at 1340-41 n 10.

9. An appropriate remedy, narrowly tailored to the violation of law previously found by the Ninth Circuit is the following: women applying to the JATC who otherwise meet the age and educational requirements shall be immediately indentured upon completing the application forms required of all apprentices. Those women shall then have the option of obtaining their own job or completing a one week safety course required of all apprentices as part of the JATC curriculum. Upon successful completion of that course, the women apprentices shall be eligible for job referral through a local union office in accordance with the applicable collective bargaining agreement.

10. The program described in ¶ 9 shall be the remedy ordered by this Court. The details of this remedial program are more fully set out in the Court's accompanying Order Granting Injunctive Relief.

11. Since plaintiffs have failed to prevail at the trial with regard to the remedies proposed, this Court having rejected the plaintiffs' proposed remedy, the plaintiffs are not entitled to any attorney fees or costs incurred. Each

party shall bear its own attorney fees and costs incurred since May 9, 1991.

Dated: Sep. 9, 1993

/s/ J. P. Vukasin, Jr.
J. P. VUKASIN, JR.
United States District Judge

[Filed Sep. 9, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-75-2062-JPV

LINDA ELDREDGE, on behalf of herself and all others similarly situated,
Plaintiffs,

v.

CARPENTERS 46 NORTHERN CALIFORNIA JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant.

ORDER GRANTING INJUNCTIVE RELIEF

BACKGROUND

The defendant Joint Apprenticeship and Training Committed ("JATC") is a joint labor-management committee, established pursuant to a trust agreement that administers a carpentry apprenticeship program in Northern California. To meets its obligations under the trust agreement, the JATC has developed a set of apprenticeship standards and a four-year aprenticeship program that lead to journeyman status upon the completion of a specified number of hours of classroom training and on-the-job experience. District offices located in various counties throughout Northern California implement the rules governing apprentices that are promulgated by the defendant JATC.

From 1974 until 1991, the JATC required each applicant to satisfy four requirements before admission into

the apprenticeship program: 1) be at least seventeen years old; 2) have a sigh school diploma or G.E.D. equivalent; 3) have his or her name placed on a new applicant referral list,[1] and 4) satisfy a first job requirement by obtaining employment with a union contractor.

During the 1974 through 1991 period, an applicant could satisfy the first job requirement in either of two ways: 1) obtain a letter of subscription ("hunting license") signed by a union contractor willing to employ him or her as a registered apprentice for at least sixty days; or 2) await placement off of the JATC applicant referral list. Under the first method, the applicant who meets the JATC age and education requirements obtains a "hunting license" from the JATC, approaches prospective employers, and, after finding an employer who offers employment, submits the "hunting license" signed by that employer to the JATC. Under the second method, the applicant signs the JATC's applicant register. When an employer calls the union dispatcher seeking an applicant, the dispatcher calls the JATC district office and obtains the first person ranked on the applicant referral list. The dispatcher then refers that person to the employer.

After the promise of a first job is obtained through either placement from the numerical sequence list or through the "hunting license" system, the applicant is considered indentured into the JATC program and, upon completion of a one-week safety course, may join the union. Approximately ninety-eight per cent of applicants obtain their first job using the first method, the "hunting license" system.[2] Any subsequent job referrals for appren-

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[1] The *applicant referral list* is maintained by the JATC and lists the name of all applicants who seek employment in order to satisfy the first job requirement. Applicants are ranked on the list in the order of sign-up.

[2] The details of the hiring procedures are set forth in *Eldredge v. Carpenters*, 440 F. Supp. 506, 511-12 (N.D. Cal. 1977).

tices are handled exclusively by the union locals pursuant to collective bargaining agreements.

On September 30, 1975, plaintiffs Linda Eldredge and Christine A. Mazur [3] filed a complaint against the JATC, alleging that the defendant's admission system to the apprenticeship program was discriminatory in violation of Title VII. 42 U.S.C. 2000(e). In 1977, plaintiffs were granted leave to amend the complaint to allege that the defendant's maintenance of the "hunting license" system as an alternative method of securing job referrals violates Title VII.

In 1979, Judge Renfrew, who presided over the action at that time, held that approximately 4,500 potential employers and 60 unions were necessary parties under Federal Rule of Civil Procedure 19 and ordered joinder within 60 days. *Eldredge v. Carpenters*, 440 F. Supp. 506 (N.D. Cal. 1977). When joinder of the employers proved impossible, the action was dismissed under Rule 19(b). *Eldredge v. Carpenters*, 83 F.R.D. 136 (N.D. Cal. 1979). The Ninth Circuit reversed, holding that the action should proceed despite the employers' absence, stating,

> The trust fund agreement grants full authority to JATC to stucture the apprenticeship program and to select the apprentices. We conclude that the employers have by contract ceded to the JATC whatever legally protectible interest they may have had in selecting apprentices to be trained. On the other hand, without the joinder of the employers, any court order that may be entered to enjoin JATC to institute programs cannot go beyond the authority granted JATC under the trust fund agreement. The absent employers are thus assured that an injunction against JATC will not trench on any rights reserved to the employers under the agreement.

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[3] On March 6, 1984, Christine Mazur's claims were dismissed by stipulation of the parties pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii).

Eldredge v. Carpenters, 662 F.2d 534, 538 (9th Cir. 1981).

On remand, the action proceeded without either the employers or union.[4] On May 24, 1984, a plaintiff class was certified of all female applicants who signed the JATC's application registers who were successful in gaining admission into the JATC apprenticeship program due to the inability to satisfy the first job requirement.

In September, 1985, the parties filed cross-motions for summary judgment. On October 24, 1985, this Court granted summary judgment in favor of the JATC, holding that the plaintiffs failed to advance any theory upon which the JATC could be held liable. This Court found that any statistical disparity between male and female hiring rates to satisfy the first job requirement was attributable to employer's conduct, over which the JATC had no control.

The Ninth Circuit reversed, finding that because the JATC had control over the admission system to its apprenticeship program, it was liable for maintaining this system in violation of Title VII. The Ninth Circuit found that the "hunting license" system created a significant satistical disparity between the percentage of male and female applicants who were ultimately indentured into the JATC.[5] *Eldredge v. Carpenters,* 833 F.2d 1334 (9th Cir. 1987). The case was remanded for the determination of an appropriate remedy.

In June, 1991, this Court held a bench trial to examine the remedy issue. On September 26, 1991, this Court approved a consent decree which, *inter alia,* provided class members with monetary relief by establishing

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[4] This Court's docket does not reveal whether the union was at any time joined. However, as of the date of this Order, the unions are not parties to this case.

[5] The Ninth Circuit based this finding on a comparison of a statistics regarding the 1976-1984 period. During that time, 38% of male applicants were indentured compared with 20.9% of female applicants.

a back pay fund as well as attorney fees and costs covering the period from the inception of the case through May 9, 1991. Subsequently, the plaintiffs and defendant submitted separate proposals recommending appropriate injunctive relief. In October, 1991, the JATC voluntarily began a new apprenticeship admission program which is either similar or identical to its proposed judgment. On November 27, 1991, plaintiffs filed a Motion to Strike the defendant's proposal from the record.

DISCUSSION

I. Plaintiffs' Motion to Strike

The plaintiffs argue that the remedy trial ended on June 7, 1991 without the introduction of the defendant's proposed remedy (referred to in the record as "Exhibit A") into evidence. Further, the plaintiffs ask that any reference to the implementation of the defendants new admission procedure instituted in October, 1991 be stricken from the defendant's proposed findings and post-trial brief.

In response, the defendant has filed a motion to re-open the record to include evidence of the defendant's adoption of the new admission program, or, in the alternative, asking this Court to accept Exhibit A as defendant's proposed remedy. In addition, the defendant points to several pages of the trial record demonstrating that the substance of Exhibit A was presented through testimony at the remedies trial.

This Court finds that the JATC should have the opportunity to submit a proposed remedy which it believes it will be able to implement. The matter was discussed extensively at trial. Furthermore, Exhibit A will assist this Court in fashioning an appropriate remedy in accordance with the Ninth Circuit's holding in *Eldredge*, 833 F.2d at 1341. Accordingly, plaintiffs' motion to strike exhibit A is hereby denied, and defendant's motion to

construe Exhibit A was the defendant's proposed remedy is granted.

Plaintiff's motion to strike any references to the defendant's implementation of a new admission procedure in the defendant's post-trial brief and proposed findings of fact and conclusions of law is hereby denied as moot. These documents have no binding effect on the parties as this Court has made findings of fact and conclusions of law as to an appropriate remedy without considerating that a new JATC admission program is currently in effect.

II. Title VII Injunctive Relief

To fashion the "most complete relief possible," it is well-established that Title VII vests district courts with "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 364 (1977). This broad discretion permits courts to require defendants to take affirmative steps in order to end discrimination and effectively enforce Title VII. *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 448. Among the factors to be considered are the necessity of the relief, the efficacy of alternative remedies, the flexibility and duration of the relief, and the impact of the relief on third parties. *United States v. Paradise*, 480 U.S. 149, 171 (1986).

There are, however, fundamental limitations on the remedial powers of the federal courts. *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976). Remedial power can be exercised "only on the basis of a violation of the law and can extend no further than required by the nature and the extent of that violation." *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399 (1982). Thus, those who have not been found to have infringed upon the substantive rights of the plaintiff cannot be subjected to any provisions within an injunctive order. Further, a

federal court must employ the remedial methods "to achieve the greatest possible degree of relief, taking into account the practicalities of the situation." *Hills*, 425 U.S. at 297.

II. The Parties' Proposals

a. Plaintiffs' Proposal

Plaintiffs seek an injunction against any use of the "hunting license" system for all male and female applicants. In its place, plaintiffs recommend that the numerical sequence system be modified to form the basis for affirmative action relief. In essence, the plaintiffs' plan requires that all persons seeking admission to the JATC's program sign the applicant referral list on a first-come, first-served basis. Employers who seek to hire an apprentice would call the local union with their request. The union would then call the JATC office, obtain the top-ranking name from the JATC's applicant register, and refer that person to the union. If none of the first four referred was a female, then the fifth such applicant referred must be female until all females in the applicant register have been referred.[6] If an apprentice is sent to the job site, an employer may decline that person, but is liable for two hours "show up" pay. Plaintiffs also seek, *inter alia*, a monitor to oversee the program, an expansion of the JATC's recruitment efforts for female applicants, a training program geared to the needs of female indentures, and the maintenance of records regarding the program.

b. Defendant's Proposal

The JATC proposes affirmative action relief that would eliminate any discriminatory admission requirement for females. Female applicants who meet the age and edu-

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[6] Plaintiffs have suggested a one-to-five ratio in keeping with statistics submitted which set a twenty percent affirmative action goal for females within the construction industry in California.

cational requirements would no longer be subject to the first-job requirement. Instead, a female is indentured into the JATC apprenticeship program as soon as she signs the applicant register. Upon competion of the one-week safety course, the apprentice is referred to the local union for placement on the union's hiring hall list.[7] At any time, the female may, but is not required, to seek employment independently. The defendants further propose that male applicants be indentured in the same manner as before: after meeting the age and education requirements, the applicant may obtain a first job through either the numerical sequence system or the "hunting license" system.

c. Remedy Adopted by this Court

Because statistically significant proof of discrimination shows a violation of Title VII for indentureship rates into the JATC's program, injunctive relief is appropriate.[8] *Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir. 1991). The relief ordered must be made with due consideration of the necessity of the relief, the efficacy of alternative remedies, the flexibility and duration of the relief, and the impact of the relief on third parties. *Paradise*, 480 U.S. at 171.

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[7] The *union hiring hall list* is maintained at the union local for union members seeking employment. Names appear on the list in numerical sequence on the order of sign-up, depending upon when the apprentice approached the union asking to be placed on the list. Employers in need of an apprentice call the union hiring hall. The union then dispatches the top-ranked member on the hiring hall list to the employer.

[8] Plaintiffs have submitted statistics gathered from 1985 through 1990. During that time, 56% of male applicants were successfully indentured, compared with 22.9% of female applicants. On this basis, the statistical disparity has increased since the Ninth Circuit found that the disparity was sufficient to find a violation of Title VII. *Eldredge*, 833 F.2d at 1339 n.7; *see supra* note 5.

The posture of this case resulting from hearings before various levels of the judiciary makes it virtually impossible to craft an order that adequately and effectively addresses all concerns in a legal and logical manner. Any relief granted "cannot go beyond authority granted JATC under the trust fund agreement." *Eldredge*, 662 F.2d at 538. The relief ordered cannot enjoin either the employers or the union, who are not parties to this action and have not been found to have violated any law. Nor can the order unnecessarily trammel the rights of the non-parties. Paradise, 480 U.S. at 171.

Throughout this litigation, the plaintiffs have expressed their primary concern of gaining indentureship to the JATC apprenticeship program. The defendant's proposal, which grants indentureship to all women who meet minimum requirements and complete a one-week safety course, provides effective relief for that concern. The defendant's system also gives females the opportunity to procure employment without encountering discrimination in the field by a prospective employer because it provides for immediate referral of indentured females to the union hiring hall list, which dispatches females to employers in numerical sequence, on a first-come, first-served basis.

In contrast, the plaintiffs' proposal requires an entirely new hiring procedure which would divest employers of any discretion to choose their employees. It presupposes that employers would call in blind for untrained, inexperienced apprentices from the numerical sequence list. As evidenced by the low use of this procedure, in reality, its utility as the sole means of hiring was not reasonably contemplated by the employers and unions when granting authority to the JATC to draft and implement a training program. To expect employers to use this exclusive means of obtaining apprentices would exceed the wildest of expectations. Plaintiff's proposal presupposes so many imponderables so as to make such an order unworkable. Fashioning a remedy which permits female applicants

indentureship into the JATC apprenticeship program should not create chaos for the hiring practices of 4500 potential employers and 60 unions.

Defendant's proposed solution offers effective relief for female applicants, although it is not perfect. The defendant's solution is, in fact, facially discriminatory against males, who must continue to satisfy the first job requirement to gain admission to the apprenticeship program. However, this proposal is the least defective of the various alternatives, and will grant the plaintiffs "the most complete relief possible," given the nature and extent of the injury.

The comparative ease with which the defendant's system can be implemented should make a monitor unnecessary. By admitting all females into the apprenticeship program, no such oversight should be required. This Court shall, however, retain jurisdiction over the parties in order to ensure compliance with the decree.

For the aforementioned reasons, this Court now orders as a remedy a JATC admission system substantially similar to that proposed by the defendant. The details of this program are set forth more fully below. (*See* Order Section, ¶ 3).

d. Attorney Fees

Having already received attorney fees for work performed up through and including May 9, 1991 as part of the parties' consent decree, plaintiff now requests fees expended in the injunctive relief phase of this proceeding. Because the defendant's plan was ultimately adopted, this Court finds that the plaintiff was not the prevailing party in this portion of the action, and accordingly each party shall bear its own costs.

ORDER

In accordance with the foregoing discussion, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion to Strike the defendant's proposed remedy ("Exhibit A") is DENIED.

2. Defendants Motion to Reopen the Record is DENIED. Defendant's Exhibit A shall be construed as the defendant's proposed remedy for injunctive relief.

3. The injunctive relief which shall govern the JATC admission procedures shall be as follows:

A. For all applicants

1. Applicants meeting the minimum qualifications will enter their names on the permanent applicant register.

2. Applicants are required to appear at the local apprenticeship office or other designated place as indicated by the J.A.T.C. At a minimum, the designated offices shall include the six (6) district offices.

3. Applicants will be received in numerical order.

B. For Women Applicants

1. A female applicant without a confirmed offer of employment shall sign the applicant register and will be indentured and advised of the availability and scheduling of the JATC Worker Safety and Tool Skills course, and when the applicant enrolls and successfully completes the course, she will be referred to the local union for placement on the out-of-work list (also referred to as the "union hiring hall list").

2. A female applicant who has a confirmed offer of employment shall sign the applicant register, receive a letter of subscription to be signed by the

employer, and then will be referred to the local union hiring hall for dispatch to that employer.

3. Acceptance of new women applicants may be terminated when the unemployment of indentured apprentices exceeds 5% in the aggregate for all the JATC's in a district council, or local JATC jurisdiction for a period not to exceed ninety (90) days. Notification will be made to all parties of the temporary closure of the program, and the reason.

C. For Male Applicants

1. Qualified male applicants will be given a Letter of Subscription and may secure their own jobs. The letter of subscription must be completed and signed by the employer signatory to the collective bargaining agreement and returned by the applicant to the apprenticeship office or other designated place as indicated. The letter of subscription is valid for thirty (30) days and is renewable.

2. For Millwrights and Pile Drivers: Qualified male applicants will be given a letter of subscription and may secure their own jobs. The letter of subscription must be completed and signed by an employer signatory to the collective bargaining agreement and returned by the applicant to the apprenticeship office or other designated place as indicated. The same expiration date shall be specified on each letter of subscription.

D. Referral of Male Applicants

1. New beginning male apprentices shall be directed to the union for dispatch as follows:

a. by letter of subscription signed by the signatory employer, or

b. by numerical sequence for the applicant register.

8. Millwrights and pile drivers may limit the opening of their program to a specific geographic area within the 46 Northern California counties. This information must be included in the announcements indicating the opening of their program to accept applicants.

a. Acceptance of new male applicants may be terminated when the unemployment rate of indentured apprentices exceeds 5% in the aggregate for all JATC's in the district council, or local JATC jurisdiction for a period not to exceed 90 days. Notification will be made to all parties of the temporary closure of the program, and the reason.

3. Male applicants who refuse placement, or are unavailable when offered a job, may be removed from the register and so notified in writing.

4. Male applicants who have not secured employment after two (2) years from their date of application, will be removed from the applicant register. All male applicants shall be informed at the time of application of the aforementioned action.

E. Employment by Employers

1. Employers, who upon selecting a collective bargaining agreement in the carpentry trades for the first time, may request priority for acceptance of apprentice applicants they then have in their employ at the time of the signing of the agreement. Such apprentice applicants will be accepted to be indentured as apprentices and will, after consultation with the employer, be placed in the appropriate period of apprenticeship. This exception applies to such individuals, regardless of whether the program is open or closed at the time.

F. Cancelled Agreement

An apprentice whose agreement has been properly cancelled for cause may be readmitted upon approval of the JATC. A second cancellation for cause may be readmitted upon approval of the JATC. A second cancellation for cause may bar the applicant permanently from the apprenticeship program within the 46 counties.

G. Records

Central records are stored permanently at the Headquarters of the Carpenters 46 Northern California JATC for all carpenter occupations.

4. This Court shall retain jurisdiction over the parties to this case.

5. A hearing shall be held before this Court on September 8, 1994 at 10:00 a.m. to examine the implementation of this Order. Any briefs regarding the issues to be addressed at the hearing shall be filed by August 26, 1994, with replies to those briefs due by September 1.

6. Plaintiffs' request for attorneys' fees is DENIED.

IT IS SO ORDERED.

Dated: Sep. 9, 1993

/s/ J. P. Vukasin, Jr.
J. P. VUKASIN, JR.
United States District Judge

U.S. SUPREME COURT REPORTS

No. 87-1786

CARPETERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE AND TRAINING BOARD,

Petitioner

v.

LINDA ELDREDGE

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487 US 1210, 101 L.Ed.2d 894, 108 S.Ct. 2857.

June 20, 1988. The motion of respondent for leave to proceed in forma pauperis is granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 833 F2d 1334.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C75-2062-J.P.V.

LINDA ELDREDGE, on behalf of herself, and on behalf of all women similarly situated,
Plaintiff,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant

October 24, 1985, Decided and Filed;
October 29, 1985, Entered

ORDER

JOHN P. VUKASIN, United States District Judge

Plaintiff Linda Eldredge brought suit under Title VII, 42 U.S.C. Section 2000e-2, against the Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee (JATC), alleging sex discrimination in the operation of the JATC's apprenticeship program. The matter was subsequently certified as a class action.

This matter is now before the court on cross motions for summary judgment. For the reasons set forth Below, the JATC's motion for summary judgment will be granted.

Defendant JATC is a joint labor-management committee responsible for establishing, supporting, and maintaining programs to educate and train journeymen carpenters

and apprentices. The principal function of the JATC is to develop, coordinate, and administer a program of classroom instruction to supplement training given by employers on the job. The JATC does not restrict the hiring of apprentices or limit the number of persons eligible for training. Essentially a school for the unionized trade, the JATC will offer training to anyone meeting the minimal criteria of being 17 years of age and having a high school diploma or equivalent, if that person has an offer of employment as an apprentice carpenter by a signatory employer, which plaintiff calls the "first job" requirement. The age and education requirements are not at issue in this case.

No evidence has been presented of direct discrimination on the part of the JATC. Instead, plaintiff, a woman applicant, alleges that the "first job" requirement has an adverse impact on women because she claims that employers are less willing to hire women as carpenters. Plaintiff contends that the JATC should be required to develop a different admission standard that minimizes the opportunity for employers to select those who gain entry to the JATC program. No evidence of discrimination on the part of any particular employer has been presented, though plaintiff indicated that she intended to present evidence at trial of statistical differences between the hiring of men and women applicant carpentry apprentices by signatory employers.

Plaintiff, however, fails to advance any viable theory upon which the JATC may be held liable for the conduct of the employers. The fact that the JATC is funded by the activities of the employers and that the employers appoint one-half of the trustees is insufficient to establish either a principal-agent or master servant relationship, either of which, if in existence, could make the JATC liable for employer conduct. *General Building Contractors Association vs. Pennsylvania* 458 U.S. 375 (1982).

Plaintiff has also failed to state any grounds by which the JATC would have an affirmative obligation to investi-

gate or prevent employers from discriminating against women. Title VII Section 2000e-2(d) does not impose a general police responsibility upon an apprenticeship committee with regard to the hiring practices of employers who contribute to the program. This is precisely what plaintiff's complaint attempts to do. In this respect, the instant case is similar to *Kaplowitz vs. University of Chicago* (N.D. Ill. 1974) 387 F.Supp. 42. In Kaplowitz the court held that a law school had no affirmative duty to investigate the hiring practices of employers using its placement office or to bar their use to employers who allegedly discriminated against women. Plaintiff has presented no authority, and the court has found none, to support that the JATC, any more than the law school in Kaplowitz, insert itself into the hiring practices of the employers whose employees seek training as apprentices.

Plaintiff, relying on a previous decision of the Ninth Circuit Court of Appeals in this case, states that the JATC has the power under its trust agreement to structure its apprenticeship program in any way it sees fit. Plaintiff, however, fails to show how the JATC has a responsibility to change the program because of the conduct of others. A May 4, 1966 opinion letter of the General Counsel for the EEOC, quoted in Kaplowitz, expressed a similar conclusion in connection with employment agencies:

> "An employment agency is not required to consider whether there is discrimination in the compensation, terms, conditions, or privileges of employment offered by an employer to his employees. Once the employment agency has lawfully referred the prospective employee for employment, the employment agency has discharged its legal duty under Title VII." EEOC, First Annual Digest of Legal Interpretations 8.

The court sees no reason why a different standard should apply here. Plaintiff states that one solution to

the alleged discrimination would be to eliminate the requirement that an applicant secure a job in order to gain admission to defendant's program. The impact of plaintiff's suggestion would be that any applicant to the program would be eligible for training by the JATC. Since the beginning of 1976, 57,484 people have applied to the program. Of these, 21,723 or slightly more than 1 out of 3 obtained a job and became eligible for the JATC's classroom training. The JATC has stated in a declaration, and plaintiff has not denied, that to attempt to train all applicants, whether working or not, would strain the program's and resources, space, and time and result in less training for each. This is a legitimate business reason for retaining the "first job" requirement.

The focus of plaintiff's complaint is discrimination by employers. As plaintiff has established no basis on which to hold the JATC liable under Title VII for the alleged unlawful conduct of these employers, defendant's motion for summary judgments must be granted.

Defendant JATC's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. The action is dismised with prejudice, with costs to defendant. The clerk is directed to enter judgment in accord with this Order.

Dated: Oct. 24, 1985.

U.S. SUPREME COURT REPORTS

No. 81-2027

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE AND TRAINING BOARD,

Petitioner

v.

LINDA ELDREDGE, *et al.*

October 12, 1982. The motion of respondents for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Dissenting opinion by Justice Rehnquist.

Same case below, 662 F2d 534, 27 BNA FEP Cas 479, 27 CCH EPD ¶ 32254, 32 FR Serv 2d 1456

JUSTICE REHNQUIST, dissenting from denial of certiorari:

This case raises a question of the proper application of Rule 19 of the Federal Rules of Civil Procedure.[1] Be-

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[1] Rule 19(a) provides in pertinent part:

> A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

cause I believe the Court of Appeals seriously misapprehended the import of the rule, I respectfully dissent.

Petitioner Joint Apprenticeship Training Committee ("JATC") is the board of trustees for the Carpenters Apprenticeship and Training Trust Fund for Northern California. The labor-management agreement that created JATC requires it to establish and maintain programs for training apprentices. Respondents, two women who sought unsuccessfully to become carpentry apprentices, sued JATC in the District Court, claiming its selection process discriminates against women in violation of Title VII, 42 USC § 2000e-2 [42 USCS § 2000e-2]. The District Court set out the facts in detail in its first opinion, 440 F Supp 506, 510-14 (ND Calif 1977).

JATC's program provides 4 years of classroom instruction for apprentices, who receive on-the-job training from an employer. In theory, applicants can become indentured apprentices in one of two ways. First, they can wait in line at a local JATC office to obtain a place on a referral list. Employers can call the local office, which will refer to them the applicant at the top of the list. Employers are entitled under their collective bargaining agreements to reject referred applicants "for any reason." If the employer hires the referred applicant, he or she is indentured and thus admitted to the training program.

Second, local JATC offices will give anyone a "hunting license," which enables the holder to hunt for jobs directly from employers. If the applicant obtains a job, he or she is indentured without regard to the referral list. In practice, very few employers use the referral list and virtually all apprentices obtain their jobs through a hunting license.

As the Court of Appeals found, the essence of respondents' amended complaint is that JATC adopted the hunting license system knowing it has a discriminatory effect on women. Respondents claim that employers discrim-

inate against women when hiring applicants with hunting licenses, and that JATC's use of the system therefore violates Title VII. 662 F2d 534, 536 (CA9 1981). Respondents sought injunctive relief requiring JATC to adopt some other system. As the District Court noted:

> [Respondents] have not specified the precise system they seek to have instituted, but it is plain that they envision a system requiring an employer who wishes to hire a beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of a number of non-discriminatory techniques.

440 F Supp, at 514 (footnote omitted).

The District Court held the employers are necessary parties under Rule 19(a)(1). It reasoned that any relief it might grant against JATC alone would be ineffective. Although more women might obtain referrals, they would not be any more successful in becoming apprentices. "There is no evidence that any change in the referral system sought here will have any effect on the apparent source of the discrimination alleged—the absent employers." [2] 440 F Supp, at 521.

Furthermore, the District Court reasoned, employers have a substantial interest in selecting their own apprentices. Even if the court could affect employers' hiring

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[2] The District Court acknowledged that it could order JATC to include women in its classroom programs, but noted that such an order would not help any woman obtain the on-the-job training that is a prerequisite for employment as a journeyman carpenter. "Thus the relief obtained in this lawsuit would serve only to swell the ranks of unemployed apprentices. This surely cannot be the 'complete relief' contemplated by Rule 19(a)." 440 F Supp. at 520. See generally Gilmore v Kansas City Terminal Ry. 509 F2d 48, 52-53 (CA8 1975); Evans v Sheraton Park Hotel, 503 F2d 177, 181 (CADC 1974).

decisions by a decree entered only against petitioner, it would be unfair to do so without affording them an opportunity to contest the allegations. Thus the employers are also necessary parties under Rule 19(a)(2)(i).[3] 440 F Supp, at 522-23.

The District Court applied the balancing process established by Rule 19(b) [4] and concluded that the employers are indispensible parties. Respondents were unable to join the 4500 employers, so the District Court dismissed the action without prejudice under Rule 41(b). 83 FRD 136 (ND Calif 1979).

The Court of Appeals reversed. 662 F2d, at 537-38. Although the Court of Appeals claimed "the district court misapprehended the legal inquiry required by rule 19(a)(1)," it did not state what form of inquiry would be appropriate. It believed the court has "both the power and the duty to enjoin" activities that violate Title VII. "[R]elief on plaintiffs' claims against JATC as an entity could be afforded by an injunction against JATC alone." 622 F2d, at 537. This seems to mean that since plaintiffs

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[3] The District Court found the employers' interests were not sufficiently similar to JATC's interests for a decree against JATC to bind the employers as non-party participants under Rule 65(d). This ruling was apparently not challenged on appeal.

[4] Rule 19(b) provides:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

have sought only an injunction against JATC, the District Court can afford the complete relief contemplated by Rule 19(a)(1) by granting only what the plaintiffs seek, regardless whether the order would have any impact on the discrimination that was apparently the reason for the lawsuit. This approach is hardly the "pragmatic" reasoning this Court commended in Provident Tradesmen Bank & Trust Co. v. Patterson, 390 US 102, 106-107, 116-17, n 12, 19 L Ed 2d 936, 88 S Ct 773 (1968).

Although the Court of Appeals thought there was "no evidence" that "employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC," 662 F2d, at 537, the substance of respondents' complaint is that *employers* discriminate against women. See 83 FRD, at 138. The District Court correctly perceived the dilemma it and respondents faced. If it ordered relief against JATC alone, it could not affect the alleged discriminatory practices. Rule 19(a)(1). If it ordered relief against the employers, it would almost certainly affect their right to select apprentices without affording them an opportunity to rebut the charge that they discriminate. Rule 19 (a)(2)(i).[5]

The Court of Appeals sought to avoid the force of this argument by claiming that because the agreement that created JATC grants it "full authority to structure the apprenticeship program and to select the apprentices . . . the employers have by contract ceded to JATC whatever legally protectible interest they may have had in selecting apprentices to be trained." 662 F2d, at 538. This is simply not correct. The agreement gives JATC authority only to select persons to refer to employers; an applicant does not become an apprentice and begin the training program until and unless an employer hires him. 440

[5] See NLRB v Doug Neal Management Co., 620 F2d 1133, 1139-40 (CA6 1980) (adopting the approach of and quoting extensively from the opinion of the District Court in this case).

F Supp, at 510-512, 83 FRD, at 137. And, as noted above, employers have bargained to retain their right to reject any applicant for any reason. Yet the Court of Appeals rather cavalierly found, in a proceeding to which the employers were not parties, that the employers have ceded these rights.

The impropriety of the Court of Appeal's ruling is demonstrated by General Building Contractors Association, Inc. v. Pennsylvania, —— U.S. ——, 73 L Ed 835, 102 S Ct 3141 (June 29, 1982), in which we considered a similar apprenticeship system. We held that a district court cannot issue an injunction against employers in an employment discrimination case under 42 USC § 1981 [42 USCS § 1981] when the employers are not guilty of intentional discrimination. In that case there apparently was no hunting license system, and the discrimination was caused by the JATC and the union, but the bar to an injunction was the same as the bar that will face the District Court on remand in this case: it is improper for a court to act against a person who has not been found to have violated the law.

The Court of Appeals, as if recognizing the unsatisfactory posture of the litigation for providing meaningful adjudication and relief, commented that "on remand it is possible that some employers . . . may move to intervene." 662 F2d, at 538. But to secure full participation only by torturing the meaning of Rule 19 to avoid dismissal, in the hopes that the absent parties will then take it upon themselves to protect their interests, is not an appealing basis for the result reached by the Court of Appeals. It is respondents who have sought to affect the hiring practices of some 4500 employers; it is respondents, and not the absent employers, who should shoulder the responsibility of joining the necessarily affected employers or suffering dismissal of their lawsuit.

If I only disagreed with The Court of Appeals's conclusion, this case would not merit this Court's attention.

However, in chosing this approach over the District Court's reasoned, pragmatic path, the Court of Appeals has, I believe, embraced a significant departure from the meaning of Rule 19. Since courts will not, I am confident, begin issuing injunctions against non-parties, the approach of the Court of Appeals will tend to reduce the district courts to issuers of " 'paper' decrees which neither adjudicate nor, in the end, protect rights." Schutten v Shell Oil Co. 421 F2d 869, 874 (CA5 1970). This is hardly a sound way to expend the energies of overburdened district judges. Furthermore, plaintiffs will be frustrated by their failure to obtain effective relief, but will gain this frustration only after lengthy litigation and the attendant inconvenience and expense, instead of reaching the same practical result after relatively brief proceedings. Indeed, the only genuine beneficiaries of the Court of Appeals's approach are attorneys who may be able to collect statutory attorneys' fees from defendants on the basis of a legal "success," without having gained anything of practical value for their clients.

Since the Court of Appeals held the employers were not necessary parties, it did not reach the question whether they were also indispensible parties under Rule 19(b). It will thus suffice for me to indicate my agreement with the reasoning of the District Court on this question as well. I would grant the petition for certiorari.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-75-2062-CBR

LINDA ELDREDGE, *et al.*,
Plaintiffs,

vs.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant.

July 9, 1979

MEMORANDUM OF OPINION

RENFREW, District Judge

On September 30, 1975, plaintiffs Linda Eldredge and Christine Mazur filed this sex discrimination suit against defendant Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee ("JATC"), alleging that defendant had violated Title VII of the Civil Rights of Act of 1964, 42 U.S.C. § 2000e-2(d). Defendant JATC is a joint labor-management committee that serves as a board of trustees responsible for the administration of the Carpenters Apprenticeship and Training Trust Fund for Northern California. The trust fund was created by a 1963 agreement among representatives of various local unions of the United Brotherhood of Carpenters and Joiners of America (AFL-CIO) and various associations of contractors who employ carpenters in Northern California.

Pursuant to its authority under the trust fund agreement, defendant JATC has established a four-year apprenticeship program leading to journeyman status upon the completion of a specified number of hours of classroom training and on-the-job experience. In order to gain admission into a JATC training program, one must obtain placement on a new applicant referral list maintained by a district office of the JATC and one must be referred to a job as a beginning apprentice.

There are two methods of obtaining such a job referral. One approach is to await referral in numerical order off the new applicant referral lists. If an employer calls a union dispatcher and seeks a beginning apprentice without requesting a particular individual, the next apprentice on the JATC's referral list will be referred. In their original complaint, plaintiffs alleged that the JATC had violated Title VII through engaging in discriminatory practices in the placement of women on the new applicant referral lists. Plaintiffs claimed that they had been treated less favorably than male applicants when seeking placement on such lists.

Applicants rarely obtain jobs through numerical referral, however, for employers very seldom call in for a beginning apprentice without requesting a particular individual. The vast majority of those admitted to the JATC training program obtain a job referral through the "hunting license" method, which enables an individual to seek employment on his own. After finding a contractor willing to employ him as an apprentice for at least 60 days, an individual may obtain a letter of subscription signed by that employer, place his name on the new applicant referral list, and then be dispatched to work for their employer.[1]

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[1] A more detailed explanation of the factual background of this case is provided in the Court's earlier opinion, *Eldredge v. Carpenters 46 Northern California, etc.*, 440 F. Supp. 506 (N.D.Cal. 1977).

After discovery in this suit revealed the unlikelihood of receiving a numerical referral off the new applicant referral lists, both plaintiffs unsuccessfully attempted to find employment through the "hunting license" method. They then amended their complaint to allege that defendant's maintenance of this alternative method of securing job referrals violates Title VII. The amended complaint alleges that employers' discrimination against women operates through the "hunting license" system to exclude women from apprenticeships.

Following plaintiffs' amendment of their complaint, the Court concluded that since the numerical referral method plays such a minor role in the job referral system, plaintiffs' efforts to obtain relief that would increase women's chances of gaining admission to defendant's apprenticeship program should be directed at the "hunting license" system rather than the numerical referral method. In fact, the remedy plaintiffs proposed did involve elimination of the "hunting license" system:

"Plaintiffs have not specified the precise system they seek to have instituted, but it is plain that they envision a system requiring an employer who wishes to hire a beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of a number of nondiscriminatory techniques." *Eldredge v. Carpenters 46 Northern California, etc.*, 440 F. Supp. 506, 514 (N.D. Cal.1977) (footnote omitted).

Thus, the relief contemplated would substantially alter the present system of hiring beginning apprentices.

In order to grant effective relief and to enable the employers to protect their interest in selecting their own employees, this Court ordered that the affected employers be joined as indispensable parties under Rule 19.[2] 440

[2] Although the Court was primarily concerned with the need to join the employers, the Court also concluded, for reasons set forth

F. Supp. at 519-527. In so doing, the Court recognized the substantiality of the employers' interest in preserving the present hiring system:

> "Even where there are no objective qualifications for a job, the interest of an employer in selecting those who, for any non-discriminatory reason, he believes to be more highly motivated or more compatible with his existing work force, is not an insubstantial one. * * * It is no doubt true that the" "unstandardized and subjective" "judgments presently being made' "lend themselves to arbitrary and discriminatory hiring" " (citations omitted), and plaintiffs have suggested that such results have occurred in this case. Nevertheless, the employers are entitled to their day in court to contest these allegations before the Court issues an order abolishing the prerogatives they presently enjoy." 440 F. Supp. at 522.

This Court concluded that the employer contributors to the trust fund and the local unions that refer applicants registered with JATC to employment were indispensable parties in whose absence the action could not in equity and good conscience proceed. On November 3, 1977, the Court ordered that if such parties were not joined within sixty days or within such further time as the Court might, on good cause shown, allow, the action would be dismissed, *Eldredge, supra,* 440 F. Supp. at 527.

Plaintiffs' Motion to Join Additional Parties Defendant

Plaintiffs have engaged in extensive discovery in order to determine which employers and unions should be joined and whether certification of defendant classes or joinder of employers' associations and the international union might serve as an alternative means of complying with the Court's order. In order to afford plaintiffs sufficient time

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in the earlier opinion, that the local unions that refer applicants registered with JATC to employment should be considered indispensable parties. *Eldredge, supra,* 440 F.Supp. at 524.

to obtain and analyze the voluminous data relating to the affected employers and local unions, the Court granted an extension of the time limit originally set for effecting joinder.[3]

Plaintiffs have moved to amend their complaint to join the Northern California Homebuilders Conference ("NCHBC"), an employers' association, and the United Brotherhood of Carpenters and Joiners of America, the international union, as additional parties defendant. Defendant JATC seeks dismissal of the action, arguing that joinder of these parties does not comply with the Court's order of November 3, 1977. The most significant objection raised by defendant is that plaintiffs have failed to establish that the NCHBC could adequately protect the interests of all employers involved in the JATC apprenticeship program. Although plaintiffs emphasize that NCHBC negotiates the lead collective bargaining agreement governing carpentry in Northern California, this fact alone does not establish that NCHBC could represent the interests of the numerous employers who would be affected by a court order directing the JATC to institute a new job referral system. Since many of the affected employers are not even members of the NCHBC, but are represented by other contractors' associations or are independent contractors, joinder of NCHBC does not fully satisfy the Court's concerns regarding representation of the employers' interest in preserving the present hiring system. Plaintiffs consider NCHBC "the part most capable of representing employer interests." Yet even assuming that NCHBC is the single party most capable of representing the employer interests at stake here, which plaintiffs have not shown, the Court is not persuaded that joinder of this one contractors' association is a satisfactory substitute for joinder of the individual employers who would be affected by the proposed decree. Further-

[3] The Court first granted an extension of the time limit to April 2, 1978, and later granted a further extension allowing plaintiffs through January 1, 1979, to join additional parties defendant.

more, the declaration submitted by Mr. Wesley Sizoo, an attorney for NCHBC, in support of JATC's opposition to plaintiffs' motion to amend, states that no employer or member organization of NCHBC has consented to have NCHBC appear on its behalf in this action. Plaintiffs have not contradicted the statement that NCHBC is not authorized to represent the employers interest here, nor have they provided the Court with a basis for concluding that NCHBC could effectively represent those interests.

The Court therefore finds that plaintiffs have not adequately complied with the Court's order of November 3, 1977, insofar as it directed joinder of the employer contributors to the Carpenters Apprenticeship and Training Trust Fund for Northern California.[4] Accordingly, the action must be dismissed under Rule 41(b) for failure to comply with the Court's order directing joinder of indispensable parties.

Defendant's Motion for Attorneys' Fees and Costs

Defendant JATC seeks an award of costs and an award of attorneys' fees for the period following the Court's November 3, 1977 opinion. In support of the motion for attorneys' fees, defendant relies primarily[5] on

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[4] Since the case must be dismissed for failure to join the affected employers, it is unnecessary to consider whether plaintiffs' proposed joinder of the international union would serve as an adequate substitute for joinder of the affected local unions.

[5] In addition, defendant apparently contends that 28 U.S.C. § 1927, which permits the Court to require an attorney personally to satisfy excess costs incurred because of the attorney's unreasonable and vexatious litigation, could serve in a Title VII suit as a basis for imposing liability on the attorney for attorneys' fees incurred because of such unreasonable conduct. This argument is based on the provision in Title VII permitting the court to award the prevailing party "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 20000e-5(k). Since the plaintiffs' attorney in this case did not act so unreasonably that costs could be imposed under 28 U.S.C. § 1927, defendant's argument need not be considered, yet the Court notes that it would be very difficult to construe 28 U.S.C. § 1927 as authorizing an award of attorney's fees.

Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1977) in which the Supreme Court held:

> "(A) district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

Defendant asserts that plaintiffs proceeded in an unreasonable and frivolous manner by engaging in extensive discovery regarding the identity of those employers, employers' associations, and labor organizations that are involved with the JATC apprenticeship program and by then moving to amend the complaint to join NCHBC and the international union, rather than individual employers and the local unions. Defendant views plaintiffs' proposed joinder of these two parties as an unreasonable failure to make use of the information obtained through discovery and states that plaintiffs have acted in total disregard of the reasoning of the Court's November 3, 1977 opinion.

Although plaintiffs' proposed second amended complaint does not adequately comply with the Court's order regarding indispensable parties, plaintiffs have not proceeded in a manner that could be categorized as "frivolous," justifying an award of attorneys' fees. Rather, they have attempted to comply with the Court's order in the face of great difficulties arising from the fact that the affected employers are so numerous that it is impractical to join them all as individual defendants. Plaintiffs cannot be faulted for considering joining contractors' associations in lieu of employers, as this alternative was referred to in the Court's earlier opinion and not conclusively rejected. *Eldredge, supra*, 440 F.Supp. at 526-527.

Defendant's memorandum regarding the requested award of costs and attorneys' fees does not specifically address the issue of costs, yet it seems to assume that

where a case is dismissed due to plaintiffs' failure to join indispensable parties, the defendant should be considered a "prevailing party" within the meaning of Rule 54(d).[6] Certainly defendant JATC is not a "prevailing party" in the sense of having successfully defended the suit on the merits, nor is this a case where plaintiffs voluntarily dismissed the suit.[7] Even assuming that defendant JATC should be considered a "prevailing party," Rule 54(d) does not compel an award of costs. The rule provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." In this case the most equitable resolution of this matter is to have each side bear its own costs. Plaintiffs have diligently, though unsuccessfully, attempted to comply with the Court's order requiring joinder of indispensable parties. The Rule 19 issues that arose in this case presented complex legal questions and particularly difficult practical problems because of the factual setting of this suit. This is not a case where defendant can be said to have "prevailed" in the usual sense. Rather, considerations of equity prevented the suit from continuing without the joinder of parties who as a practical matter could not be joined.[8] The Court

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[6] Federal Rule of Civil Procedure 54(d) provides, in relevant part:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."

[7] In *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F.2d 575 (9 Cir. 1941), the Court of Appeals for the Ninth Circuit considered the meaning of the term "prevailing party" as used in a statutory provision governing an award of attorneys' fees. The court concluded that the defendant was a "prevailing party" although the case had not gone to trial on the merits. Since the plaintiff had voluntarily dismissed the suit, the defendant was the prevailing party "within the spirit and intent of the statute." 121 F.2d at 576.

[8] While the Court is convinced the result reached here is required for the reasons set forth above, it is nonetheless troubled

of Appeals for the Ninth Circuit has stated that "the awarding of (costs under Rule 54 (d)) is discretionary with the trial judge." *K-2 Ski Company v. Head Ski Co.*, 506 F.2d 471, 476-477 (9 Cir.1974). The Court concludes that in this case discretion should be exercised to deny the award of costs sought by defendant JATC.

Accordingly, IT IS HEREBY ORDERED that plaintiffs' motion to join additional parties defendant is denied, and the case is dismissed without prejudice pursuant to Rule 41(b) on the ground that plaintiffs have failed to comply with the Court's order to join indispensable parties.

IT IS HEREBY FURTHER ORDERED that defendant's motion for an award of attorneys' fees and costs is denied, and the parties shall bear their own costs.

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by the seemingly harsh result. Counsel for plaintiffs have devoted a substantial amount of time and effort in vigorously prosecuting this case. Because the Court is desirous that women be afforded equal opportunities in all areas of employment, including the construction industry, the Court asked counsel for JATC at a status conference in chambers whether JATC would take every step to insure that women would be given every opportunity to be employed as carpenters. In a proposed statement submitted to the Court and counsel for plaintiffs, defendant JATC "reaffirm(ed) (its) desire and intention to exert (its) best efforts to assist women in becoming more active and involved in the carpentry craft through greater participation in the carpenters apprenticeship program. The JATC will communicate with participating carpenter local unions and with individual employers and employer associations to make then aware of the opportunities for employing female apprentices, and will encourage individual employers to hire qualified female apprentices. It is the intention that these efforts will result in an awareness of individual employers to the employment of women and a substantial increase in the number of females enrolled in the apprentice program." The Court expects that defendant JATC will adopt this statement and exercise its best efforts toward these laudable goals. Hopefully the ultimate relief sought by plaintiffs may be obtained by this informal method.

APPENDIX B

Other Opinions Issued in this Case Presented in Chronological Order

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UNITED STATES DISTRICT COURT
N. D. CALIFORNIA

No. C-75-2062-CBR

LINDA ELDREDGE and CHRISTINE A. MAZUR,
Individually and on behalf of all others
similarly situated,
Plaintiffs,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES
JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant.

Nov. 3, 1977

AMENDED MEMORANDUM OF OPINION

RENFREW, District Judge.

Plaintiffs Linda Eldredge and Christine A. Mazur filed this sex discrimination action on September 30, 1975. The complaint alleged that the defendant Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee ("JATC") had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(d), by denying female applicants equal opportunity for placement on the new applicant referral lists used to supply

names to union dispatchers for referral of applicants to jobs as beginning apprentices. Plaintiffs sought preliminary relief; certification of a class composed of all women who applied to the JATC for placement on those lists between August 18th and 29th, 1975;[1] orders requiring the JATC to place and refer applicants in the order in which they apply and to establish an affirmative action program for women; damages including back pay; and costs of suit.

Plaintiffs' motion for a temporary restraining order was denied on October 3, 1975. Although the Court simultaneously ordered the defendant to show cause why a preliminary injunction should not issue, a hearing on that order was withdrawn from the calendar pursuant to a stipulation and order on December 30, 1975. On July 16, 1976, defendant noticed a motion to dismiss the action or for summary judgment; on August 26, 1976, plaintiffs moved to amend their complaint, for class certification, and for summary judgment. Each of these motions was extensively briefed by both parties, and oral arguments were heard on September 16, 1976. On September 30th, plaintiffs' motion to amend the complaint was granted, and an amended complaint was filed February 10, 1977. The principal effects of the amendment were to delete the prayer for damages and preliminary relief, and to add new allegations of discrimination. In addition to the alleged discrimination in placement on referral lists, plaintiffs now allege that defendant's system for referring new applicants to the jobs necessary for admission into apprenticeship, under which the vast majority of new applicants are referred not in numerical order off lists but as they are requested by name by

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[1] Plaintiffs have not amended the complaint to allege any larger class. However, they state in their Memorandum in Support of Plaintiff's Motion to Certify Action as a Class Action, filed August 26, 1976, at 1, that the class is to include all women who were discriminatorily denied admission to defendant's apprenticeship and training program at any time since August of 1973.

contractor-employers, is itself discriminatory in effect. Since the amended complaint alleges that illegal effects result from the operation of a system in which parties not before the Court are intimately involved, the Court on February 10, 1977, requested the submission of further factual information and briefing relating to defendant's suggestion that employers and labor unions in the Northern California carpentry trade are indispensable parties to the action. (Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, filed September 9, 1976, at 6-7.) Defendant filed a memorandum on this point on March 18, 1977, to which plaintiffs responded on May 9th.

The issues presently before the Court are (1) whether the action must be dismissed for failure to exhaust state and administrative remedies; (2) whether all necessary parties as defined by Rule 19, Fed.R.Civ.P., are presently before the Court; (3) whether class certification is appropriate; and (4) the cross motions for summary judgment. For the reasons set forth below, the Court concludes that plaintiffs have exhausted their remedies within the meaning of Title VII, but that the affected employers and unions must be joined prior to any further disposition of the case.

I. FACTUAL BACKGROUND

Defendant JATC is a joint labor-management committee composed of equal numbers of employer and employee representatives. The committee serves as board of trustees responsible for the administration of the Carpenters Apprenticeship and Training Trust Fund for Northern California ("Fund"), which was created by a 1963 agreement ("trust fund agreement") among representatives of various local unions of the United Brotherhood of Carpenters and Joiners of America (AFL-CIO) and various associations of contractors who employ carpenters in Northern California. The agreement grants the defendant, as board of trustees, "the power and duty * * * to

establish, support or maintain programs * * * for the purpose of educating and training persons as journeymen or apprentices" in all classifications covered by any collective bargaining agreement requiring employer contributions to the Fund.[2] To meet this obligation, defendant has developed a set of apprenticeship standards and established a four-year apprenticeship program leading to journeyman status upon the completion of a specified number of hours of classroom training and on-the-job experience. The procedures for selecting among applicants to enter this program are the subject matter of this suit.

No selection procedures are specified in either the trust fund agreement or the relevant collective bargaining agreements. Authority to establish such procedures in each of 43 local regions has been delegated to separate local Joint Apprenticeship and Training Committees ("local JATC's"). However, those local bodies are required to operate within the framework of policies adopted by the defendant, and most administrative tasks are performed by defendant's ten District Offices. Until 1974, procedures varied from region to region, but in that year defendant instituted a program imposing uniform selection

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[2] The Northern California carpentry trade is governed by two master agreements which are identical in all respects relevant to this action. Carpenters Master Agreement and Hiring Procedures between the Northern California Home Builders Conference *et al.* and the Carpenters 46 Northern Counties Conference Board, Exhibit 11 to the deposition of Charles F. Hanna, filed August 26, 1976; Carpenters' Master Agreement (1974-1977) between the Associated General Contractors of California, Inc., *et al.* and the United Brotherhood of Carpenters and Joiners of America, Exhibit 12 to the deposition of Charles F. Hanna, *supra* ("Master Agreements"). Individual employers neither participate in negotiations nor sign these agreements. Instead, they sign brief Memorandum Agreements by which they agree to comply with a master agreement, to contribute to various trust funds, including the apprenticeship and training trust fund, in the amounts specified in the master agreement, and to be bound by all obligations imposed by the corresponding trust fund agreements.

procedures designed to bring all 46 counties governed by the trust fund agreement into compliance with provisions of state and federal law requiring joint apprenticeship committees to adopt affirmative action plans to increase the number of minorities in the trade.[8] The new procedures were embodied in "Annex C-1," an Equal Opportunity Addendum to the Carpenters 46 Northern California Counties Apprenticeship Standards, and were approved by the California Administrator of Apprenticeship. Local JATC's operated according to Annex C-1 until November 18, 1976, when the Santa Clara County Federation of Joint Apprenticeship and Training Committees obtained state approval of an "amended C-1." The majority of local JATC's have subsequently shifted to the amended C-1 upon findings by the Administrator of Apprenticeship that they have met their quotas for minorities. However, a few are still operating under the original Annex C-1.

Under both the original and the amended Annex C-1, the qualifications and requirements for admission to apprenticeship are the same: to be qualified, an applicant must be at least 17 years of age and have a high school diploma, G.E.D., or equivalent; to gain admission, he must obtain a position on a new applicant referral list maintained by a local JATC and a referral slip from a local union dispatching him to a job as a beginning apprenticeship. Once an applicant has satisfied both the listing and the job requirements, he may sign an apprenticeship agreement at one of defendant's district offices, join the union local, and attain the status of "regis-

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[8] *See* Secretary of Labor, Regulations on Equal Employment Opportunity in Apprenticeship Training, 29 C.F.R. Part 30 (1976); Cal.Labor Code §§ 3070 *et seq.* and 3076 (West Supp. 1977); Cal.Adm.Code T. 8, Part 1, Ch. 2, §§ 200 *et seq.* Although California law was recently amended to require joint apprenticeship committees to set goals for women, the precise requirements and enforcement procedures of those new provisions are as yet unclear. Neither party relies on state law in this action.

tered" or "indentured" apprenticeship eligible for classroom training under JATC auspices. All subsequent job referrals for registered apprentices are handled exclusively by the union locals pursuant to collective bargaining agreements. JATC participation in such procedures is limited to the referral of new applicants to their first jobs.

The original Annex C-1 provides for a "closed list" system of first referrals. Only applicants listed on an existing new applicant referral list are eligible for referral, and placement on that list may only be obtained during liimted open periods selected by the local JATC's. Forty-five days prior to a scheduled opening, the local JATC sends announcements to news media, schools, employment services, outreach programs, and others specifying the date and time of the opening, the duration of the open period, and the procedure for applying. At the specified time, applicants line up at the designated District Office and are given appointments to return and sign, in the order in which they appeared, the "applicant register" for the local JATC from which they desire to be referred. The names of those who are qualified are placed on the new applicant referral list in that order up to a maximum of one and one-half times the estimated number of persons to be referred during the referral period. The list is reviewed by a district coordinator for compliance with affirmative action goals, posted, and distributed to local union dispatchers. Applicants named thereon remain in the pool of those eligible for referral for two years, and may be referred in two ways. First, each applicant is given a letter of subscription or "hunting license," which he may use to seek employment on his own. When he finds a contractor willing to employ him as a registered apprentice for at least sixty days, that employer's signature on the letter will upon presentation to the union dispatcher entitle the applicant to a referral slip. Second, an applicant may await placement off the new applicant referral list simply by keeping the JATC apprised of a telephone number where he can be reached within 24

hours. When an employer calls the union dispatcher and requests a beginning apprentice without specifying any particular individual, the dispatcher obtains from the JATC District Office the name of the first ranking applicant in numerical order on the list and issues a referral slip for that person. After receiving a referral slip by either method, the applicant is indentured.

Although the orginal C-1 provided considerable room for employer judgment in the selection of new apprentices, if generated dissatisfaction among employers because it restricted the use of the hunting license and thus the potential apprentices available for hire to those named on an established list. This objection provided the impetus for adoption of the amended C-1, which establishes an "open list" or "unrestricted hunting license" procedure. An applicant must still obtain a position on the new applicant referral list prior to indenture, but he may do so at any time and regardless of the number of applicants already on the list. Thus, any individual, whether or not listed with the JATC in advance, may obtain a letter of subscription signed by an employer, place his name on the applicant register, enter into an apprenticeship agreement, and be dispatched to work as a registered apprentice forthwith. The only significance of the list under this system is that the rare employer who calls in for a beginning apprentice without naming an individual will receive the applicant highest in numerical order on that list. It is not disputed that employers are reluctant to hire new apprentices by this method, sight unseen. Of 288 new applicants referred to jobs from the implementation of Annex C-1 until June of 1976, only six, or two per cent, obtained jobs in this way.

Plaintiffs were not aware until mid-1976 of the near futility of awaiting numerical referral off the new applicant referral lists. Believing high placement on the list to be crucial to entry into defendant's program, each plaintiff lined up outside a JATC District Office at mid-

night on August 17, 1975, nine hours before the scheduled opening for applications. Ms. Eldredge thereby obtained the eighth position in line outside the District 5 (San Francisco) Office and Ms. Mazur obtained the eighth position outside the District 8 (Martinez) Office. Ms. Eldredge and Ms. Mazur did subsequently receive the corresponding eighth positions on local JATC new applicant referral lists at San Francisco and Martinez, respectively. However, each plaintiff alleges that she encountered an "atmosphere of discrimination that was hostile and discouraging to women" during the application process.

Specifically, Ms. Eldredge states that the first person in line at San Francisco, a woman, was originally given the number two appointment slip to return and sign the applicant register. The error was corrected at the request of the woman, but when she returned to sign, she did so over a long strip of white tape which had been placed over the number one spot. Ms. Eldredge further alleges that Percy Long, Apprenticeship Coordinator for District 5, was evasive in answering her questions as to how applicants were placed on new applicant referral lists and how they would be referred to jobs.

Ms. Mazur states that she applied at the Martinez District Office specifically in order to obtain referrals for the Richmond area, where she understood new apprentices were in greater demand, and that she was deprived of the opportunity to sign the Richmond register when District 8 personnel failed to inform her and other women in line that two separate sets of numbered appointment slips were being distributed: one for applicants who wished to sign the Martinez local JATC applicant register, and the other for those who wished to sign the Richmond local register. Arlis Paslay, Supervisor of the District 8 Apprenticeship Program, announced to those in line that anyone from the Richmond, El Sobrante, or San Pablo area should obtain appointment slips from his secretary while those from

Eastern Contra Costa County should do so from him. Although Ms. Mazur heard the announcement, she attached no significance to it in light of her Oakland residence, and as a result obtained the number of eight appointment slip for Martinez from Mr. Paslay. When she returned to sign the register, she learned for the first time of the Richmond register but was told she could not sign until after all those with Richmond appointment slips had done so. Because two men who were behind Ms. Mazur in line and who similarly were unaware of the existence of two sets of slips were permitted to sign the Richmond register in fourth and fifth positions, plaintiff feels there has been differential treatment on the basis of sex. However, neither man remembers clearly how he came to sign the Richmond register, and both are residents of San Pablo. Deposition of Joe A. Silveria, filed Feb. 24, 1976, at 6, 14-21; Deposition of Victor Louro, filed Feb. 24, 1976, at 6, 13-17. There is no evidence to suggest that either obtained his position on the Richmond register by anything but routine application of the procedure described by Mr. Paslay.

On or about September 2, 1975, each plaintiff filed formal charges with the Equal Employment Opportunity Commission ("EEOC") alleging that she had suffered discrimination in attempting to obtain a position on defendant's new applicant referral lists. The EEOC on September 8th referred the charges to the California Fair Employment Practices Commission ("FEPC"), as required by 42 U.S.C. § 2000e-5(c), with the recommendation that the case was appropriate for immediate preliminary injunction.[4] By notification of September 11, 1975, the FEPC replied that it would not process the charges in

[4] *See* Notice of Deferral Transmittal, dated 8 Sept. 1975, attached as Exhibit D to defendant's Memorandum in Support of Defendant's Motion to Dismiss, etc., filed July 16, 1976. Although the EEOC request does not itself appear on this form, the FEPC response cites that request as the reason for the state's failure to process the claim.

light of the EEOC recommendation, and on September 29th the EEOC issued right-to-sue letters to both plaintiffs on the ground that it would not be able to investigate, conciliate or file suit within 180 days. Upon receipt of those letters, plaintiffs filed this action.

Despite the alleged discrimination, both plaintiffs had fulfilled the first requirement for admission to apprenticeship when their names were placed on new applicant referral lists. Accordingly, they were eligible for job referrals pursuant to the original Annex C-1 then in effect. Each attended an orientation meeting in late September, 1975, at which she was informed of the two alternative methods of obtaining a referral, but because each believed it was unlikely she could convince a contractor to request a woman by name, neither initially used her "hunting license" to seek employment on her own. Although each plaintiff continuously maintained a current telephone number in the hope of receiving a numerical referral, neither has been dispatched by that method. In August, 1976, after Ms. Mazur had received a letter from the Martinez JATC stating that many applicants were finding jobs on their own, after defendant had moved for summary judgment in this action, and after discovery had revealed the unlikelihood of numerical referral, both plaintiffs unsuccessfully attempted to find jobs by contacting contractors. At the same time, they sought to amend their complaint to allege that defendant's maintenance of the "hunting license" system as an alternative method of securing job referrals itself violates Title VII.

As of May, 1976, defendant's records show 3,220 registered apprentices, only 13 of whom are women.[5] Of the approximately 1700 persons who obtained positions on new applicant referral lists when applications were

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[5] In a subsequent affidavit, Charles F. Hanna states that 25 women are currently enrolled as apprentices. Affidavit of Charles F. Hanna, filed March 10, 1977, at 11. However, no complete statistics later than those of May, 1976, are presently before the Court.

opened in August 1975, 92 are women, but as of May, 1976, only four, or four percent of the women on those lists had been dispatched to jobs while 398, or 25 percent of the men had been dispatched. Plaintiffs now contend that this low representation of women is the result of the establishment and maintenance by defendant of the "hunting license" system, ostensibly as an alternative method of obtaining the first job referral necessary for admission, but in fact knowing that because of employer preference, it is the nearly exclusive method. They have submitted the affidavits of three female apprentices and one female applicant, as well as a letter signed by twelve female apprentices, describing the employer discrimination against women which, they allege, operates through the hunting license system to exclude women from apprenticeship. The act of discrimination complained of on this theory is thus the defendant's use of a system that passes the decision as to who may enter the program to others who are known to discriminate against women.

Although plaintiffs continue to complain of discriminatory practices in the placement of women on new applicant referral lists, the relative insignificance of placement on those lists as long as the hunting license system remains available suggests that any relief directed to such practices alone would in no way enhance the ability of women to gain admission to defendant's program.[6] Such relief would be appropriate only if the JATC were first ordered to abolish the hunting license system and to institute a new system for referring applicants to employment, eliminating the present discretion of employers to select new apprentices from those who apply to them. Plaintiffs have not specified the precise system they seek

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[6] Even Ms. Mazur, who seeks an order granting her and others similarly situated their "rightful places" on the Richmond new applicant referral list, has failed to show that she would have been referred to a job if she had been given a place on that list rather than the Martinez list.

to have instituted, but it is plain that they envision a system requiring an employer who wishes to hire a beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of a number of non-discriminatory techniques.[7]

II. EXHAUSTION OF REMEDIES

Title VII provides an independent basis for federal jurisdiction over actions pursuant to its terms. 42 U.S.C. § 2000e-5(f)(3). Prior to seeking judicial relief, however, plaintiffs must exhaust both state and administrative remedies. Specifically, section 2000e-5(c) requires that they first file charges with the state agency, if any, charged with authority to enforce state employment discrimination laws, and await state action for sixty days unless proceedings are earlier terminated; and section 2000e-5(f)(1) requires that they file timely charges with the EEOC, defer filing suit for 180 days after those charges are filed, and obtain a right-to-sue letter from the EEOC. Defendant argues that plaintiffs have not satisfied the state exhaustion requirement and that the action must accordingly be dismissed. This contention is without merit.

Even where the deferral requirement is not satisfied, dismissal is unnecessary; the proper course is to retain

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[7] Possibilities include the hiring hall system currently used for referral of journeymen to jobs; selection on the basis of the rank order of scores of applicants on one or more qualification standards; random selection from a pool of eligible applicants; selection on an equal basis from separate lists established for minorities, women, and all others; and random or numerical selection from a pool of eligibles chosen by a system guaranteeing population parity. Affidavit of B. J. Miller in Support of Plaintiffs' Statement of Position, filed May 16, 1977; Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed August 26, 1976, at 7-8.

jurisdiction while plaintiffs seek redress from the state agency. *Waters v. Heublein, Inc.*, 547 F.2d 466, 468 (9 Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 2988, 53 L.Ed.2d 1100 (1977); *Equal Employment Opportunity Commission v. Wah Chang Albany Corp.*, 499 F.2d 187, 189 n.3 (9 Cir. 1974). That procedure is unnecessary in this case, however, since it is well settled that section 2000e-5(c) is satisfied by the procedure followed here: initial reference of the matter to the state agency by the EEOC, followed by notification from the state agency that it will take no action. *Love v. Pullman Co.*, 404 U.S. 522, 525, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972); *Motorola, Inc. v. Equal Employment Opportunity Commission*, 460 F.2d 1245, 1246 (9 Cir. 1972). Defendant contends that the FEPC's decision not to pursue the matter was improper under California law in that no reference was made to the Administrator of Apprenticeship and no hearing was provided. Regardless of the merits of this contention, *see* Cal.Labor Code § 3096 (West Supp.1977), violations of state law in the treatment of a claim do not offend the deferral rule: federal policy requires only that the state be afforded an opportunity to take the case. *Pacific Maritime Ass'n v. Quinn*, 465 F.2d 108, 110-111 (9 Cir. 1972). Finally, plaintiff's failure to allege deferral in their pleadings is of no significance, since no such allegations are required by Rule 8(a)(1), Fed.R.Civ.P. *Equal Employment Opportunity Commission v. Wah Chang Albany Corp., supra*, 499 F.2d at 189.

A more difficult question is posed by plaintiffs' undisputed failure to wait 180 days after the EEOC's assumption of jurisdiction before filing suit, as required by section 2000e-5(f)(1). There is a sharp division in the authorities as to whether this requirement is jurisdictional. *Compare Budreck v. Crocker National Bank*, 407 F.Supp. 635 (N.D.Cal.1976), and *Jones v. Pacific Intermountain Express*, 10 F.E.P. Cases 914 (N.D.Cal.1976), *with*

Lewis v. FMC Corp., 11 F.E.P. Cases 31 (N.D.Cal. 1975), and *Howard v. Mercantile Commerce Trust Co.*, 10 F.E.P. Cases 158 (E.D.Mo.1974). For the reasons stated in *Budreck, supra*, the Court adheres to the view that compliance with the statutory waiting period is ordinarily a prerequisite to the assumption of jurisdiction. Plaintiffs apparently believe that their prayer for a temporary restraining order and a preliminary injunction made compliance with the statutory period unnecessary for all purposes. Memorandum of Law in Response to Defendant's Motion to Dismiss and for Summary Judgment, filed August 26, 1976, at 23-24. Such a *per se* rule cannot be supported. However, in the circumstances of this case the Court agrees that jurisdiction was properly assumed to entertain those motions, and that the passage of 180 days prior to hearing on a motion to dismiss cured the jurisdictional defect that would otherwise have required dismissal of the action for permanent relief.

At plaintiffs' request, the EEOC issued right-to-sue letters only 18 days after receipt of the case from the FEPC, and this action was filed the following day. The result of this procedure was to foreclose any possibility of conciliation—either formal or informal—prior to the hardening of positions and narrowing of issues that inevitably follow the assumption of roles as adversary parties in a judicial proceeding, impairing further efforts at voluntary settlement. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 461, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); *Budreck v. Crocker National Bank, supra*, 407 F.Supp. at 643-644. In the ordinary case, such short-circuiting of the time periods contemplated by the statute fraustrates the intention of Congress to promote conciliation and voluntary settlement. Yet Congress itself recognized, by enacting a provision authorizing the EEOC to seek preliminary relief, 42 U.S.C. § 2000e-5(f)(2), that the interest in enforcement may outweigh the policy favoring nonjudicial settlement when an aggrieved person is threatened with irreparable injury that imperils the ade-

quacy of any final relief. Congress failed to similarly provide for private litigants, however, and their efforts to invoke the jurisdiction of federal courts on motions for preliminary relief pending administrative disposition of the underlying charges have met with mixed success.[8] The conflicting results derive from the courts' efforts to accommodate two competing concerns: first, that it would be unfair and unrealistic to require exhaustion where rights are threatened with irreparable harm, a failure to act may permanently foreclose adequate relief, and the EEOC's caseload precludes it from seeking preliminary relief, *see Bowe v. Colgate Palmolive Co.*, 272 F. Supp. 332, 338 (S.D. Ind.1967), *aff'd in part and rev'd in part*, 416 F.2d 711 (7 Cir. 1969); *Drew v. Liberty Mutual Insurance Company*, 480 F.2d 69, 73-74 (5 Cir. 1973), *cert. denied*, 417 U.S. 935, 94 S.Ct. 2650, 41 L.Ed.2d 239 (1974); and second, that to permit individ-

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[8] For the view that courts have jurisdiction to hear claims for preliminary relief despite the failure to exhaust administrative remedies, *see, e. g., Drew v. Liberty Mutual Insurance Company*, 480 F.2d 69 (5 Cir. 1973), *cert. denied*, 417 U.S. 935, 94 S.Ct. 2650, 41 L.Ed.2d 239 (1974); *Parks v. Dunlop*, 517 F.2d 785 (5 Cir. 1975); *Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F.Supp. 318 (D.Mass.), *aff'd*, 545 F.2d 222 (1 Cir. 1976). For the opposing view, *see, e. g., Nottelson v. A. O. Smith Corp.*, 397 F.Supp. 928 (E.D.Wis. 1975); *Troy v. Shell Oil Co.*, 378 F.Supp. 1042 (E.D.Mich.1974), *appeal dismissed as moot*, 519 F.2d 403 (6 Cir. 1975); *Collins v. Southwestern Bell Telephone Co.*, 376 F.Supp. 979 (E.D.Okl.1974).

Other courts have blurred the distinction between jurisdiction and the availability of preliminary relief, and appear to hold that jurisdiction may be available only in cases where relief on the merits is appropriate, *see Berg v. Richmond Unified School District*, 528 F.2d 1208, 1211 (9 Cir. 1975), *cert. granted*, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977); *Jerome v. Viviano Food Co., Inc.*, 489 F.2d 965, 966 (6 Cir. 1974) (holding no irreparable harm and thus no jurisdiction where no existing employee-employer relationship); *Donald v. Ray*, 377 F.Supp. 986, 987 (E.D.Tenn. 1974); or only where the circumstances particularly demand such relief, *Townsend v. Exxon Co.*, 420 F.Supp. 189, 193 (D.Mass.1976) (retaliatory discharge).

uals to bypass the statutory mechanism in cases where the EEOC does not seek prompt judicial relief would flood the courts with such requests, *see Collins v. Southwestern Bell Telephone Co.*, 376 F.Supp. 979 (E.D.Okl. 1974).[9]

Although the issue is currently before the United States Supreme Court, the law of this Circuit at the present time is that in a "limited class of cases" where there exists a high probability of success on the merits and the threat of irreparable harm, a court may entertain a suit to maintain the status quo pending administrative disposition. *Berg v. Richmond Unified School District*, 528 F.2d 1208, 1211 (9 Cir. 1975), *cert. granted*, 429 U.S. 1071, 97 S.Ct. 806, 50 L.Ed.2d 788 (1977). Although the facts of this case depart from the *Berg* rule in at least three respects, none of those differences calls for a change in the result. First, since the motion for a preliminary injunction was withdrawn from the calendar, the Court has made no findings on the merits. Nevertheless, the EEOC's evaluation of the case as one appropriate for immediate preliminary injunction would appear to satisfy the threshold test that there be some substance to the claim. To permit suits only where such a determination is made need not lead to any flood of litigation. Second, plaintiffs' motions went beyond merely "maintaining the status quo," since plaintiffs were not employees seeking relief from threatened changes in the employment relationship, but applicants for admission to defendant's program. A few courts have drawn a distinction on this basis, *see* footnote 8, *supra*, but differential treatment is

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[9] A third concern occasionally mentioned is that without jurisdiction over the underlying cause of action, a court is precluded from providing relief of any sort. *Troy v. Shell Oil Co., supra*, 378 F.Supp, at 1048; *Nottelson v. A. O. Smith Corp., supra*, 397 F.Supp. at 938. This concern seems unfounded, however, in view of the principle established in other areas of administrative law that a court has power to preserve the status quo by staying private action pending an administrative decision. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1257 (1971).

not justified by the policies involved: if a preliminary injunction is otherwise appropriate, it makes no difference to the injured plaintiff or to the enforcement of Title VII that the injury is to be imposed by inaction rather than by action. Finally, plaintiffs arguably sought more than interim relief pending administrative disposition, since the EEOC had prematurely issued its final right-to-sue letter, thus terminating the administrative phase. *See EEOC v. Pacific Press Publishing Association*, 535 F.2d 1182, 1186 (9 Cir. 1976). However, the EEOC had certified that it would be unable to reach the case within the 180-day period. Thus, no administrative disposition was to be anticipated. Moreover, the prospects of informal settlement are unlikely to have been impaired by the initiation of the suit for permanent relief to any greater extent than they would already have been impaired by the filing of the motion for a preliminary injunction. To hold that the action was barred by an EEOC error having no effect on statutory policy would indeed be pointless. Had the parties known that the 180-day period would be interpreted as jurisdictional, they could have limited their initial prayer to preliminary relief, waited 180 days, obtained a right-to-sue letter, and sought permanent relief, all without any signifiicant substantive effect.

Although the Court thus concludes that jurisdiction was properly taken over the claims for preliminary relief, this conclusion does not in itself justify the assumption of jurisdiction over the underlying claim. That jurisdiction can only be justified if the lapse of 180 days between the EEOC's assumption of jurisdiction and the hearing on a motion to dismiss can cure the initial failure to meet that jurisdictional requirement. It is settled that subsequent receipt of a right-to-sue letter can cure the jurisdiction in a suit initially filed without one, *Berg v. Richmond Unified School District, supra*, 528 F.2d at 1212, but the differing policies involved make it less clear that the mere passage of time, absent a dismissal and a refiling with the EEOC, should ordinarly be permitted to cure the juris-

dictional defect of premature filing. *Compare Budreck v. Crocker National Bank, supra,* 407 F.Supp. at 647 n.19, *with Berg v. LaCrosse Cooler Co.,* 548 F.2d 211, 213 (7 Cir. 1977), and *Troy v. Shell Oil Co.,* 519 F.2d 403 (6 Cir. 1975). Where the parties were properly before the Court in the first instance on motions for preliminary relief, however, the Court concludes that no policy would be served by a dismissal. The only departure from proper procedures was the premature issuance of the right-to-sue letter and the resulting premature filing of a complaint for permanent relief. To dismiss now would not deter other litigants from seeking judicial action in circumstances where preliminary relief may be appropriate, and thus would not serve the policy of promoting informal settlement prior to the onset of litigation. It would no doubt discourage the EEOC from divesting itself of claims prematurely, and thus would serve the congressional purpose of providing ample opportunity for administrative action. Where the backlog of cases prevents an administrative disposition in any case, however, this result has insufficient practical impact to justify the imposition of hardship in a particular case.

III. *RULE 19*

It is no doubt true, as plaintiffs argue, that a joint apprenticeship committee cannot avoid liability under Title VII by delegating the responsibility for screening applicants to a third party. *See Crockett v. Green,* 388 F.Supp. 912 (E.D.Wis.1975), aff'd 534 F.2d 715 (7 Cir. 1976). The relief contemplated in this case, however, will have substantial impact on both the employers who must hire apprentices if they are to receive on-the-job experience and the unions which pursuant to collective bargaining agreement are responsible for the dispatch of all employees to jobs with signatory employers. Rule 19[10]

[10] Rule 19 provides in part:

"(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive

does not, of course, require joinder of all parties who may be affected by an order. The issues are, first, whether employer or union involvement is of such a nature that without them complete relief cannot be accorded those already parties, Rule 19(a)(1), and second, whether their interests are such that to proceed in their absence may as a practical matter prejudice them or subject the parties already before the Court to a substantial risk of incurring inconsistent obligations, Rule 19(a)(2). If either of these conditions is shown, Rule 19(a) requires that the absent parties be joined if to do so will not deprive

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the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

the Court of jurisdiction over the subject matter. If a party cannot be joined as required, Rule 19(b) calls for a second inquiry to determine whether in equity and good conscience the action should be dismissed.

Plaintiff's initial contention is that when no relief is sought against absent parties, those parties cannot be regarded as "indispensable." This argument is wholly without merit. By definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair either the effectiveness of relief or their own or present parties' ability to protect their interests. The cases cited by plaintiffs are not to the contrary. Each merely lists the failure to seek relief against the absent parties as one factor in a decision that joinder was not required, in cases where no involvement or participation by those parties in the challenged discriminatory practices had been alleged. *Hibbler v. Miller's of Birmingham Bankhead Highway, Inc.*, 496 F.2d 1171, 1172 (5 Cir. 1974); *Waters v. Heublein, Inc.*, 11 E.P.D. ¶ 10,620 at 6587 (N.D.Cal.1975), *rev'd on other grounds*, 547 F.2d 466 (9 Cir. 1976), *cert. denied*, —— U.S. ——, 97 S.Ct. 2988, 53 L.Ed.2d 1100 (1977). In contrast, the involvement of both employers and unions in the subject matter of this action is evident on the face of the amended complaint.

In a similar vein, plaintiffs contend that complete relief can be accorded by an order against the JATC alone, since pursuant to the trust fund agreement it is solely responsible for establishing and maintaining apprenticeship programs, since no particular procedure for selecting apprentices is enshrined in any agreement to which absent parties are signatories, and since it alone selected and can abolish the "hunting license" system, subject to state approval. This argument misconceives the nature of the issues under Rule 19(a)(1). Although the legal position of the present defendant and its theoretical ability

to comply with an order are relevant, they may be outweighed by a finding that absent parties may as a practical matter prevent the full realization of the intended relief. The Court must guard against the formulation of " 'paper' decrees which neither adjudicate nor, in the end, protect rights." *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5 Cir. 1970). Thus the contractual rights and duties relied on by plaintiffs are only a starting point for a full consideration of the actual role of each party in the formulation of the practices complained of and the stake each has in maintaining them. *See LeBeau v. Libby-Owens-Ford Co.*, 484 F.2d 798, 800 (7 Cir. 1973).

A. *The Employers*

Employers are not obligated to hire beginning apprentices by either the master collective bargaining agreements governing the trade [11] or the trust fund agreement itself. They need only employ one apprentice (at any experience level) if five journeymen are employed, and one additional aprentice for each five journeymen thereafter. Master Agreements § 40. When an employer does request a beginning apprentice, he retains the right to reject the individual dispatched "for any reason," Master Agreements § 49(9), subject only to liability for two hours "show-up time" to be paid to the applicant, Master Agreements § 30. No new system of referral adopted by the JATC could either require contractors to employ beginning apprentices, other than those necessary to meet the contractual minimum, or compel those who do so to accept any particular individual. Nor could such an obligation be created by any decree fashioned by this Court in their absence. Employers could refuse to hire beginning apprentices or refuse to hire women when referred without violating the terms of a decree ordering the JATC to adopt a revised referral system. Although such actions could violate an order requiring the implementation of

[11] *See* note 9, *supra*.

an affirmative action plan to promote the indenturing of women, the employers are not sufficiently "identified * * * in interest" with the JATC to be bound by such a decree as non-party participants under Rule 65(d), Fed.R.Civ.P. *Regal Knitwear Co. v. Board,* 324 U.S. 9, 13-14, 65 S.Ct. 478, 89 L.Ed. 661 (1945); *see Equal Employment Opportunity Commission v. Local Union No. 3, International Union of Operating Engineers,* No. C-71-1277-RFP (N.D.Cal. March 16, 1977).

Employers thus have the ability to defeat any relief ordered in this action in three ways. First they may refuse to hire new apprentices at all, if they do not wish to accept individuals without first interviewing them. Under a revised referral system, the absence of applicants actively seeking to convince employers to hire beginning apprentices may tend to encourage this result. Of course, such action would eventually result in a reduction of the total number of apprentices, and some employers would ultimately be forced to hire new apprentices in order to maintain the apprentice-journeyman ratios specified in the collective bargaining agreements and in the California statute governing projects undertaken pursuant to contracts with state and local government entities. Cal.Labor Code § 1777.5 (West Supp.1977). However, no evidence has been submitted to demonstrate the impact of these apprentices, in light of the large number of experienced apprentices presently unemployed, the inapplicability of the contractual provision to employers using less than five journeymen, and the numerous exemptions created by the statute.

Second, employers may, with the cooperation of union locals, hire unregistered, non-union apprentices, who may obtain sufficient experience and skill to be classified as journeymen and thus be accorded equal treatment at the hiring hall without regard to participation in defendant's program. Such apprentices would not, however, satisfy either the contractual or the statutory obligation to hire

apprentices in specified ratios. See Master Agreements § 40; Cal. Labor Code § 1777.5, *supra*. Moreover, under United States Department of Labor regulations all contracts covering federally financed and assisted construction must include a clause requiring nonregistered apprentices to be paid at a rate determined by the Secretary of Labor for the class of work actually performed, rather than the lower rate permitted for registered apprentices. 29 C.F.R. § 5.5(a)(4) (1976). Again, no evidence as to the overall impact of these provisions on the trade is before the Court.

Finally, assuming that these provisions will motivate employers to hire significant numbers of beginning registered apprentices, female applicants may still be rejected at a cost of two hours' pay, which may be estimated from the wage scale effective June 16, 1976, at approximately $21 each.[12] Plaintiffs have submitted substantial evidence which appears to show that it is the employers, not the JATC, who are responsible for the dearth of women in the carpentry trade. There is nothing in the record to indicate that the reasons presently given by employers for rejecting women would not persuade them to continue rejecting them at this slight additional cost.[13] It is not clear whether this tactic would violate any contractual obligation owed to the JATC, but even if it would, there is no suggestion in the record that the JATC has enforce-

[12] The schedule of wages attached to the Northern California Home Builders Conference Master Agreement, Appendix 7 to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, filed September 9, 1976, shows a wage rate for beginning apprentices of $6.75 per hour and a schedule of contributions for fringe benefits totalling $3.80 per hour, for a total of $21.10 for the two hours of show-up time.

[13] Defendant has suggested that the use of a closed list may have motivated local JATC employees to accelerate efforts to indenture minority apprentices in order to return to the free selection system once quotas were attained. This factor would almost certainly be out-weighed in this case, however, by the documented reluctance of employers to hire women.

ment authority adequate to force recalcitrant employers to accept female applicants.[14]

The record does not reveal whether an applicant who is dispatched and rejected by the employer would become a registered apprentice. Assuming that he would, the ability of employers to reject those dispatched would not impede attainment of plaintiffs' announced goal of entry into defendant's program. It would, however, prevent any meaningful participation in that program, since only schooling, not on-the-job training, would be available to women. Thus, the relief obtained in this lawsuit would serve only to swell the ranks of unemployed apprentices. This surely cannot be the "complete relief" contemplated by Rule 19(a).

It is no answer to these problems to say that plaintiffs seek limited relief in order that women may gradually integrate the trade, and that if future employer discrimination excludes women from the full benefits apprenceship, such women may seek legal redress against the responsible parties. The plain fact is that the opportunity to gradually integrate the trade exists now to the same extent and subject to the same obstacles as it would under any decree that could be fashioned against the JATC alone. There is no evidence that the change in referral system sought here will have any effect on the apparent

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[14] Defendant has stated that the JATC has some police authority and can withdraw the use of apprenticeship facilities from employers who hire unindentured apprentices. Memorandum of Points and Authorities RE: Indispensable Parties and the Jurisdiction of the Court, filed March 18, 1977, at 5. No document evidencing this authority is before the Court, and it is unclear whether the JATC could withdraw facilities from employers who do not bypass the referral system entirely but simply refuse to accept certain individuals. Even if this sanction is available, any attempt to impose it would place the JATC in the difficult position of having to prove the illegal motive of discrimination or face liability for refusing to provide services merely because the employer had exercised his contractual right to reject applicants "for any reason." Master Agreements § 49(9).

source of the discrimination alleged—the absent employers. More women might indeed attain the status "registered apprentice," but to obtain jobs they would have to bring to court precisely the same parties who would be sued in the absence of any decree against the JATC.[15] Although the plaintiffs' motive—to avoid unnecessarily taxing judicial resources—is a laudable one, the Court must conclude that it would be a misuse of those resources to pursue this action to a conclusion in the absence of parties without whom any relief would quite probably be a futile gesture.

None of the authorities cited by plaintiffs supports a contrary result. The Court has been directed to only one case in which relief was afforded against a party which had used a non-party's discriminatory action as the vehicle for its own discrimination. *Crockett v. Green, supra*, 388 F.Supp. 912. There, the City of Milwaukee was ordered to suspend a requirement that skilled tradesmen have completed a formal apprenticeship and a designated amount of journeyman experience prior to hiring, because past union discrimination had prevented blacks from obtaining those qualifications. Since the effectiveness of that relief did not depend in any way on union participation, *Crockett* provides no precedent for the relief sought here. The analogy would be more apt if the City had there been ordered to require the union to accept more blacks into apprenticeship.

Plaintiff relies on decisions holding that relief may be granted against unions to modify discriminatory job referral systems in the absence of the affected employers.

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[15] In fact, a decree establishing a closed list referral system could hamper the process of obtaining relief against discriminating employers. Under the amended Annex C-1, any woman may seek work as a carpenter and file suit against each employer who rejects her because of her sex. Under the type of system sought by plaintiffs, the class of potential plaintiffs who may sue a given discriminating employer will be far more limited.

Kaplan v. Intern. Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators, 525 F.2d 1354 (9 Cir. 1975); *United States v. Sheet Metal Workers Intern. Ass'n, Local Union No. 36*, 416 F.2d 123, 132 n.16 (8 Cir. 1969); *United Minority Workers v. Intern. Union of Operating Engineers*, 10 E.P.D. ¶ 10,581 (D.Or.1975); *Butler v. Local No. 4 and Local No. 269, Laborers' Intern. Union*, 308 F.Supp. 528 (N.D.Ill.1969). None of these decisions, however, involved allegations of discriminatory conduct by the employers, a fact on which the courts expressly relied in both *Kaplan, supra*, 525 F.2d at 1361, and *United Minority Workers, supra*, 10 E.P.D. at 6402. Where, as in those two cases and in *Butler, supra*, only internal union policies were challenged,[16] there was no reason to fear that the relief would not be complete. A more substantial question was presented in *Sheet Metal Workers, supra*, in that the changes in referral practices ordered by the court required modifications in the collective bargaining agreement and thus were not possible without the cooperation of the employers. In apparent recognition that such relief could not be ordered against the unions alone, the Court of Appeals stated that compliance could be achieved by discontinuing those practices which were found to violate Title VII, presumably by abandoning the referral system altogether. In this case, no such resolution is possible, because the defendant's effective abandonment of its responsibility for referral is precisely the act complained of, and the underlying job requirement cannot be eliminated without altering the nature of the apprenticeship program itself.

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[16] In *Butler v. Local No. 4 an Local No. 269, Laborers' Intern. Union, supra*, the court expressly rejected the union defendants' assertion that plaintiffs sought the creation of a hiring hall, a remedy which would have required the cooperation of non-party employers. Instead, the court found that plaintiffs had alleged the existence of a de facto hiring hall and sought only to end the unions' discriminatory practices within that framework. 308 F.Supp. at 532.

Of more relevance to the instant case are decisions in which courts have found evidence suggesting that the absent party may have been responsible for the alleged discrimination, and have therefore ordered joinder. *Gilmore v. Kansas City Terminal Railway Co.*, 509 F.2d 48, 52-53 (8 Cir. 1975); *Evans v. Sheraton Park Hotel*, 164 U.S.App.D.C. 86, 90, 503 F.2d 177, 181 (1974); *Cf. Wright v. Stone Container Corp.*, 524 F.2d 1058, 1062 (8 Cir. 1975) (doubting adequacy of class representative who failed to join union whose policies contributed to creation of suspect practices); *Equal Employment Opportunity Commission v. Eagle Iron Works*, 8 E.P.D. ¶ 9541, at 5356 (S.D.Iowa 1974) (mere signatory of collective bargaining agreement not indispensable party where no suggestion it has engaged in unlawful practices); *Ostapowicz v. Johnson Bronze Co.*, 369 F.Supp. 522, 531-532 (W.D.Pa.1973), *modified on other grounds*, 541 F.2d 394 (3 Cir. 1976) (union need not be joined where discriminatory effect of collective bargaining agreement is caused solely by employer actions). *See also Haas v. Jefferson National Bank*, 442 F.2d 394, 397-398 (5 Cir. 1971) (absent party who participated in alleged unlawful conversion should be joined). Even where no responsibility for unlawful conduct is alleged, courts have recognized that relief may be ineffective where absent parties are "active participants" without whom a program challenged as discriminatory could not operate. *Spirt v. Teachers Ins. and Annuity Ass'n of America*, 416 F. Supp. 1019, 1022 (S.D.N.Y.1976); *McDonald v. General Mills, Inc.*, 387 F.Supp. 24, 38 (E.D.Cal.1974). In this case, the employers are not only participants in the apprenticeship program but indeed the allegedly principal cause of the discrimination complained of. Plainly here, as in *Evans v. Sheraton Park Hotel, supra*, the Court should decline the invitation to grant "rather ineffective symptomatic relief, leaving the root * * * to continue." 164 U.S.App.D.C. at 90, 503 F.2d at 181.

This determination alone is sufficient to require joinder. However, it should be noted that the second factor to be considered under Rule 19(a), the interest of the employers in the subject matter of the action, supports joinder as well. Under the present system employers enjoy the right to select their own beginning apprentices subject only to the requirement that the applicant be listed with the JATC in localities where the original Annex C-1 is in effect. Even where there are no objective qualifications for a job, the interest of an employer in selecting those who, for any non-discriminatory reason, he believes to be more highly motivated or more compatible with his existing work force, is not an insubstantial one. Nor does recognition of that interest require any assumption that women dispatched under a revised system would be less motivated or qualified in any way than men: the employer's interest in selecting an employee of his own choosing would be violated by the dispatch of an undesirable man as much as by that of a similar woman. It is no doubt true that the " 'unstandardized and subjective' " judgments presently being made " 'lend themselves to arbitrary and discriminatory hiring' ", *Waters v. Furnco Construction Corp.*, 551 F.2d 1085, 1089 (7 Cir. 1977), *quoting Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721, 724 (8 Cir.), *cert. denied*, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973), and plaintiffs have suggested that such results have occurred in this case. Nevertheless, the employers are entitled to their day in court to contest these allegations before the Court issues an order abolishing the prerogatives they presently enjoy.

Plaintiffs maintain that the employers here gave up their ability to protect this interest when they agreed to be bound by the trust agreement and thus delegated to the JATC the authority to establish apprenticeship programs. Although the terms of the instrument are unclear on this point, we may assume that the employers did thereby agree to submit to any referral system adopted by the JATC. Even so, they retained a significant measure

of control over the system selected, since they appoint half the members of the JATC and may bargain with the remaining union members. A court order instituting a new referral system will deprive them of this control. Of course, such an order would not wholly eliminate employer freedom to select apprentices, since they are always entitled to reject applicants referred. That freedom would, however, be constrained in two ways: it could be exercised only at the price of showup time; and the pool of applicants would be limited to those referred, one at a time, by the union. Any conceivable decree would thus practically impair the employer's ability to protect a significant interest in selectivity in hiring.

The fact that this interest stems from a collective bargaining agreement does not, as plaintiffs suggest, render it irrelevant for purposes of Rule 19. None of the decisions cited for that proposition establishes any such *per se* rule: each court has examined the circumstances of the case to determine the actual effect of the action on the absent party, and a key consideration has been that the discriminatory conduct alleged is limited to the named defendant. *Waters v. Heublein, Inc., supra*, 11 E.P.D. at 6587; *Rosario v. New York Times Co.*, 10 E.P.D. ¶ 10,450, at 5947 (S.D.N.Y.1975); *Atkinson v. Owens-Illinois, Inc.*, 9 E.P.D. ¶ 10,155, at 7704 (N.D.Ga.1975); *Equal Employment Opportunity Commission v. Eagle Iron Works, supra*, 8 E.P.D. at 5356; *Ostapowicz v. Johnson Bronze Co., supra*, 369 F.Supp. at 522, 531-532.

Nor does the presence of a party who is already defending employer interests to some extent obviate the need for joinder. Though frequently mentioned, this factor has merely been one among many considered in determinations pursuant to Rule 19. *See United States v. Navajo Freight Lines, Inc.*, 525 F.2d 1318, 1322 (9 Cir. 1975) (international and local unions); *United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 310 (5 Cir. 1975), *vacated on other grounds*, 431 U.S. 324, 97 S.Ct. 1843,

52 L.Ed.2d 396 (1977) (international and local unions); *United States v. St. Louis-San Francisco Railway Co.*, 52 F.R.D. 276, 280 (E.D.Mo.), *Rev'd on other grounds*, 464 F.2d 301 (8 Cir. 1971), *cert. denied*, 409 U.S. 1107, 1116, 93 S.Ct. 900, 34 L.Ed.2d 687 (1973) (union and its members); *United States v. Enterprise Ass'n of Steamfitters*, 360 F.Supp. 979, 995 (S.D.N.Y.1973) (trade association and its members). Here the JATC is a legal entity separate and distinct from the employers and unions which created it. No agency relationship has been alleged, and the JATC's interest are not identified with those of the employers as are those of the entities dealt with in the cases cited above. In fact, the JATC has no independent interest in defending employer selectivity. Here, as in *Grogg v. General Motors Corp.*, 12 E.P.D. ¶ 11, 204 (S.D.N.Y.1976), there simply are not adequate assurances of the unity of the various parties to hold joinder unnecessary on that ground. 12 E.P.D. at 5542.

Finally, decisions rejecting the claim that employers must be joined in suits seeking the elimination of discriminatory union referral practices are inapposite. In each such case the employers had already completely given up their right to selectivity when they agreed to accept those persons dispatched by the union and retained no control over union methods of referral.[17] No case has been found

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[17] In *Kaplan v. Intern. Alliance of Theatrical and Stage Employees and Motion Picture Operators, supra*, 525 F.2d 1354, the Court did to some extent modify procedures for operation of a referral system which were set forth in a collective bargaining agreement, and thus not beyond employer control. However, the order affirmed in Kaplan generally required that the female plaintiff be placed on an existing roster which entitled photographers to preference in hiring, without altering the system of hiring or the degree to which employers were free to select their own employees. The only possible prejudice from the addition of one individual to a pool to which employers had already agreed to give preference was potential lack of qualification, and the evidence indicated that employers considered the plaintiff qualified. 525 F.2d at 1861.

which orders a union or apprenticeship committee to establish a hiring hall or adopt other measures limiting employer selectivity in hiring in the absence of the effected employers.

B. *The Union Locals*

The role of the union locals in the subject matter of this action is limited to the dispatch of beginning apprentices at the request of employers. Defendant argues that their presence is required by Rule 19(a)(1), because they are in a position to frustrate the effectuation of any relief by simply ignoring new JATC procedures and continuing to dispatch those individuals requested by employers. Although the extent of the unions' contractual obligation to abide by procedures adopted by the JATC is unclear, in practice it appears that the JATC can enforce its selection of new apprentices by refusing to indenture any wrongly dispatched individual. Thus, to the extent that employers desire *registered* apprentices, the unions would be unable to satisfy that demand without complying with the JATC procedures. The relief ordered in this action could be frustrated only to the extent that unregistered apprentices satisfy employer needs.

With respect to Rule 19(a)(2), the unions have an interest in the maintenance of an effective apprenticeship and training program which produces adequate numbers of competent apprentice and journeyman members. If, for the reasons discussed in Part III, A, *supra*, the decree of the Court were to result in either a significant decline in the number of apprentices employed or an increase in unemployment among apprentices, that interest would be significantly impaired.[18] Moreover, on these assumptions

[18] Contrary to plaintiffs' assertion, the impairment of union interests goes beyond the mere dissatisfaction of "majority" employees that may be anticipated in any Title VII case. *See Phillips v. Carborundum Co.*, 361 F.Supp. 1016, 1020 (W.D.N.Y.1973). Here, the order may prevent the satisfaction of obligations to all the unions' apprentice members and to the union itself.

the unions would be entitled to demand that the JATC fulfill its obligation under the trust fund agreement to maintain an adequate apprenticeship program. The JATC would then be placed in the untenable position of choosing between two mutually exclusive obligations: to assure the indenturing of women pursuant to court order, and to maintain the program as required by contract.

On the present state of the record it is impossible to say with certainty that the relief sought here will reduce the total number of apprentices employed or increase unemployment among apprentices, thus requiring joinder under Rule 19(a)(2), or increase the demand for unregistered apprentices, thus requiring joinder under Rule 19(a)(1). However, in light of plaintiffs' allegations and supporting affidavits to the effect that employer reluctance to hire women is the real source of the discrimination alleged, the Court concludes that employer action leading to one or more of these results is sufficiently likely as to require joinder of the affected union locals.

IV. JOINDER

Defendant argues that joinder is barred by failure to name the absent parties in charges filed with the EEOC and failure to file suit against those parties within 90 days of receiving notice of right to sue, as required by 42 U.S.C. § 2000e-5(f)(1). Neither of these omissions can prevent joinder in this case.

Title VII's policy of encouraging conciliation and voluntary settlement in the first instance has led courts to formulate a rule that parties not named in an EEOC charge are not subject to suit. *Thornton v. East Texas Motor Freight*, 497 F.2d 416, 423 (6 Cir. 1974); *LeBeau v. Libby-Owens Ford Co., supra*, 484 F.2d at 799; *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 719 (7 Cir. 1969). This policy-based rule is, however, subject to numerous exceptions in favor of conflicting policies, two of which are relevant here.

First, since EEOC charges are frequently filed without legal assistance at an early stage of the proceedings, it would frustrate the goals of Title VII to require procedural exactness in stating the charges. *Kaplan v. Intern. Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators, supra*, 525 F.2d at 1359. Thus, charges are to be construed with the utmost liberality, and parties named in the factual statement in sufficiently specific terms to apprise the EEOC of the source of the alleged discrimination may subsequently be joined in judicial proceedings. *Id.; Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-463 (5 Cir. 1970). Here, both plaintiffs alleged that they were being denied membership in the "carpenters' union." As respondent, Ms. Eldredge named "Carpenters Local 46, J.A.T.C.," and Ms. Mazur named "Union 46, Carpenters Joint Apprenticeship Training Committee." These statements were plainly sufficient to apprise the EEOC of the unions' involvement in the alleged discrimination and thus to support joinder in this action.

Second, when application of the procedural bar would prevent joinder pursuant to Rule 19(a), important policies favoring enforcement of Title VII, judicial economy, and the rights of litigants would be frustrated by an inflexible rule. In such cases, considerations of "uniformity * * [and] of the time, effort and expense involved in duplication, with the possibility of inconsistent results" demand that the entire matter be disposed of in one proceeding. *Bremer v. Saint Louis Southwestern Railroad Co.*, 310 F.Supp. 1333, 1340 (E.D.Mo. 1969). Joinder is thus plainly appropriate where no purpose of conciliation could have been served if the parties had been named. *See Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1095 (6th Cir. 1974). Several courts have so held in situations where the absent party was not alleged to have been responsible for any discrimination, or would naturally have become involved in any efforts to conciliate. *Grogg v.*

General Motors Corp., supra, 12 E.P.D. at 5542; *Equal Employment Opportunity Commission v. Braswell Motor Freight Lines, Inc.,* 8 E.P.D. ¶ 9714 (N.D.Tex.1974); *Equal Employment Opportunity Commission v. Brotherhood of Painters, Decorators and Paperhangers,* 384 F. Supp. 1264, 1268 (D.S.D.1974); *Hochstadt v. Worcester Foundation for Experimental Biology,* 425 F.Supp. 318, 323 (D.Mass.), *aff'd,* 545 F.2d 222 (1 Cir. 1976). Here, it may be noted that no concilation was attempted; consequently the failure to name the employers had no practical effect on this policy. Such a finding is not necessary to joinder, however, for numerous courts have found that the interests represented by Rule 19 and by enforcement of Title VII simply outweigh the interest in conciliation:

> "However, we are not convinced that the value of conciliation supersedes the value of enforcement, to the end that after a charge has been processed before the EEOC and court action commenced, the district court is powerless to order joinder under Rule 19(a) and is further required to dismiss the action under the indispensable party provisions of Rule 19 (b). Where, as here, the chartering International was an obscure party, requiring court action to determine whether or not its presence in the action was necessary for complete relief among those already parties, to deny joinder under 19(a) would cripple the rights of the charging party as well as those of the party charged." *Evans v. Sheraton Park Hotel, supra,* 164 U.S.App.D.C. at 92, 503 F.2d at 183.

The absent employers here were "obscure" parties in the sense that plaintiffs apparently did not know them to be a source of discrimination until long after the EEOC charges were filed. Even after the employers' role was identified, it was not unreasonable, in the absence of knowledge of the relationships among the parties, to assume that complete relief could be obtained from the JATC alone. That the absent parties were "obscure" in this sense has not, however, generally been found to be

a prerequisite to joinder pursuant to Rule 19(a) despite the failure to name parties before the EEOC. *Macklin v. Spector Freight Systems, Inc.*, 156 U.S.App.D.C. 69, 83 n. 25, 478 F.2d 979, 993 n.25 (1973) (dictum); *Equal Employment Opportunity Commission v. McLean Trucking Co.*, 525 F.2d 1007, 1012 (6 Cir. 1975) ("indispensable" parties joined for purpose of interpreting collective bargaining agreement); *Held v. Missouri Pacific Railroad Co.*, 373 F.Supp. 996, 999 (S.D.Tex.1974) (dictum that "indispensable" parties may be joined); *Equal Employment Opportunity Commission v. Rexall Drug Co.*, 9 E.P.D. ¶ 9936, at 6931 (E.D.Mo.1974); *Ostapowicz v. Johnson Bronze Co., supra*, 369 F.Supp. at 531 (dictum); *Reyes v. Missouri-Kansas-Texas Railroad Co.*, 53 F.R.D. 293, 297 (D.Kan.1971); *Torockio v. Chamberlain Manufacturing Co.*, 51 F.R.D. 517, 519 (W.D.Pa.1970) (joinder pursuant to Rule 21 where insufficient facts for Rule 19 joinder); *Bremer v. Saint Louis Southwestern Railroad Co., supra*, 310 F.Supp. at 1340. This line of authority disposes of defendant's claim that failure to name the employers in charges before the EEOC is fatal to joinder under the circumstances presented here.

The same policies dispose of defendant's second contention: that joinder is barred by plaintiffs' failure to add the employers and unions within 90 days of receipt of a right-to-sue letter. Defendant has cited no authority for the proposition that this statute of limitations will bar joinder of necessary parties pursuant to Rule 19. None of the decisions dealing with failure to name parties in EEOC charges *supra*, addressed this issue, despite the fact that the statutory period will have run in most cases by the time a court has determined that absent parties must be joined. The Court concludes that the policies underlying Rule 19, which have been held to override the conflicting Title VII policy of conciliation, must also override the policy of finality expressed in this short limitations period.

Of course, a plaintiff cannot amend his complaint to allege an entirely new cause of action and add the parties

necessary thereto after the period of limitations has passed. *See Marlowe v. Fisher Body*, 489 F.2d 1057, 1064 (6 Cir. 1973). But Title VII permits a claimant to seek judicial relief for "any discrimination like or reasonably related to the allegations of the EEOC charge," without returning to the agency for administrative consideration of the new charges. *Equal Employment Opportunity Commission v. Pacific Press Publishing Association, supra*, 535 F.2d at 1186; *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9 Cir. 1973). The present charge of maintaining a discriminatory referral system differs significantly from the original charge of discriminatory practices in placement of applicants on lists. But the new charge does not change the plaintiff's basic contention: that discriminatory procedures in admission to defendant's apprenticeship program have drastically limited the ability of women to enter the carpentry trade. To anyone familiar with defendant's procedures, the shift in focus from the "list" to the "job" requirement for admission could reasonably have been expected to grow out of the original charge once information was made available as to the operation of the system. *See Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678, 688-689 (5 Cir. 1975); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399 (3 Cir. 1976). Thus, the amendment was within the scope of the original charges, and any parties necessary to the adjudication thereof may be joined at this time.

Although there is no procedural bar to joinder of the absent parties, the affected employers number in excess of 4500, and more than 60 local unions appear to be involved. Plaintiffs have represented that joinder is feasible without explaining how they intend to proceed in light of these numbers. The only alternatives appear to be certification of defendant classes or joinder of contractor associations in lieu of individual employer members, and District Councils, the Carpenters 46 Northern Counties Conference Board, or the International itself in lieu of

union locals. That either of these alternatives can provide a feasible and adequate solution to the problems raised in Part III, *supra,* is open to serious question. The former would raise a host of questions under Rule 23, while the latter would raise further questions under Rule 19 as to whether individual employers and union locals remain indispensable parties despite the joinder of their representatives. Decision on these issues must, however, await plaintiffs' selection of a method of joinder and the submission of information not presently before the Court, including the precise number of employers affected, the number belonging to trade associations, the nature of those associations, their ability to represent and protect the interests of their members, their capacity to control and police individual members, and the relationships and respective roles of each of the various levels of union organization. Absent these facts, it is impossible to determine whether joinder may be accomplished as required by Rule 19(a).

If joinder cannot be accomplished, the facts discussed in Part III, *supra,* will require that the action be dismissed pursuant to Rule 19(b). Any relief directed to the JATC alone would create a substantial possibility of prejudice to both employers and unions, as well as to the JATC itself. No form of decree or protective provisions sufficient to avoid or reduce this prejudice has been suggested, and the Court is aware of none. Most significantly, there is no evidence that a judgment rendered in the absence of these parties would have any significant effect on the evil complained of in this action. Plaintiffs' alternative remedy is, unfortunately, burdensome and expensive: to pursue in individual lawsuits those employers alleged to have discriminated. However, the Court cannot on this ground alone countenance any further expenditure of judicial resources in an action so unlikely to lead to effective relief.

Plaintiffs have strenuously urged that joinder be postponed until after determination on the issue of liability.

Although the Court may have the power to join parties to participate in the formulation of relief, *see United States v. Chesapeake & Ohio Railway Co.*, 471 F.2d 582, 592-593 (4 Cir. 1972), *cert. denied*, 411 U.S. 939, 93 S.Ct. 1893, 36 L.Ed.2d 401 (1973); *Pegues v. Mississippi State Employment Service*, 57 F.R.D. 102, 105 (N.D. Miss.1972), that procedure is appropriate only where, as in *United States v. Chesapeake & Ohio Railway Co., supra*, the presence of those parties cannot immediately be determined to be necessary for complete relief under Rule 19(a)(1). Where, as here, it is clear from the outset that effective relief is impossible in the absence of the parties in question, it would be a monumental waste of resources to adjudicate the issue of liability before determining whether those parties can be joined. Moreover, where the absent parties claim interests that may be affected by a decree or that may generate relitigation, it is the exclusion of those parties from the liability phase of the litigation that may create the harms anticipated by Rule 19(a)(2). The proper course in such a case is plainly immediate joinder in order that all the issues may be litigated at one time. *See Pegues v. Mississippi State Employment Service, supra*, 57 F.R.D. at 105.

Accordingly, IT IS HEREBY ORDERED that defendant's motion to dismiss for lack of jurisdiction over the subject matter by reason of failure to exhaust state and administrative remedies is denied.

IT IS HEREBY FURTHER ORDERED that the employer contributors to the Carpenters Apprenticeship and Training Trust Fund for Northern California, and the local unions which refer apprentices registered with the defendant JATC to employment are indispensable parties in whose absence the action cannot in equity and good conscience proceed. If they are not joined within sixty (60) days of the date of this order, or such further time as the Court may, on good cause shown, allow, the action will be dismissed.

APPENDIX C

Denial of Rehearing and Rejection of Suggestion for Rehearing *En Banc* By Court of Appeals

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[Filed Oct. 25, 1996]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-16925

D.C. No. C-75-2062

LINDA ELDREDGE, individually, and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,
Defendant-Appellee.

ORDER

Before: FLETCHER, REINHARDT, and KOZINSKI, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

FEDERAL RULE OF CIVIL PROCEDURE AT ISSUE

F.R.C.P. 19(a) & (b)

Rule 19

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of

relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

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APPENDIX E

STATUTORY PROVISIONS AT ISSUE

42 U.S.C. §§ 2000e-2(d), (j), & (k) and 2000e-5(g)(1)

42 U.S.C. § 2000e-2

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-5

(g)(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in a unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

APPENDIX F

SUMMARY OF MINORITY AND FEMALE PARTICIPATION IN PETITIONER'S APPRENTICESHIP PROGRAM DECEMBER 1995

[Source: California Department of Industrial Relations, Division of Apprenticeship Standards & California Apprenticeship Council Annual Report on Activities to the Legislature and Public, 1995, Exhibit 5, Table 3. This table contains the official statistics for all 20 apprenticeship programs administered by Petitioner Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee.]

Location	Total Apprentices	Minorities		Women		Completions	
		No.	%	No.	%	No.	%
San Francisco	429	243	56.6	65	15.2	59	13.8
Monterey	88	31	35.2	5	5.7	8	9.1
Contra Costa	600	225	37.5	49	8.2	37	6.2
Central Valley	127	58	45.7	7	5.5	14	11.0
Marin	91	18	19.8	9	9.9	5	5.5
Delta-Yosemite	69	16	23.2	2	2.9	14	20.3
North Valley	158	41	25.9	10	6.3	21	13.3
San Mateo	230	94	40.9	12	5.2	24	10.4
Napa	8	3	37.5	0	0.0	3	37.5
Santa Clara	404	182	45.0	14	3.5	47	11.6
Sonoma	196	37	18.9	7	3.6	28	14.3
Solano	186	63	33.9	9	4.8	6	3.2
Humboldt	41	21	51.2	8	19.5	1	2.4
Santa Cruz	49	19	38.8	4	8.2	5	10.2
Alameda	439	231	52.6	46	10.5	50	11.4
South Tahoe	6	0	0.0	0	0.0	1	16.7
North Tahoe	6	1	16.7	0	0.0	0	0.0
Bay Area Hardwood	26	10	38.5	1	3.8	3	11.5
Nor. Cal. Millwrights	163	39	23.9	24	14.7	9	5.5
Nor. Cal. Piledrivers	211	97	46.0	44	20.9	4	1.9
Totals	3527	1429	40.5	316	9.0	339	9.6

SUPREME COURT, U.S.
FILED
MAR 24 1997

No. 96-1345

In The

Supreme Court of the United States

October Term, 1996

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Petitioner,

v.

LINDA ELDREDGE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of the opinion of the Ninth Circuit in this case, reported at 94 F.3d 1366 (9th Cir. 1996).

For the convenience of the Court, the published opinions in this case will be designated herein as *Eldredge I*, *Eldredge II*, *Eldredge IV*, *Eldredge V*, and *Eldredge VI*, as they are in the Petition, at 1-2. Opinions will be cited both to the West reporter and to Petitioner's Appendix at the appropriate page.

STATEMENT OF THE CASE

The Petition contains several critical misstatements. These are corrected below. In addition, set out below are matters on which Respondents rely which are not included in the Petition.

Correction Of Misstatements In Petition

Petitioner provided a misleading description of this case when it stated that the suit alleges "that the JATC, by permitting employers to select their own beginning apprentices, had engaged in a discriminatory employment practice that had a disparate impact upon female applicants." Petition (Pet.), p.3. In fact, Respondents challenge a JATC admission procedure, the "hunting license system," which has had a disparate impact on the admission of women applicants to the JATC carpentry apprenticeship program.[1]

The Ninth Circuit's 1981 ruling in *Eldredge II* was misstated in the Petition at page 14; the Court did not assert that the employers had "legally surrendered the right to select their own beginning apprentices." Rather, the Circuit Court

---

[1] The case was brought under 42 U.S.C. § 2000e-2(d), which makes it an "unlawful employment practice" for a "joint labor management committee controlling apprenticeship" to discriminate on the basis of sex in admission to an apprenticeship program.

found that the employers had ceded whatever legally protectible interest they may have had in "selecting apprentices to be trained" [in the JATC carpentry apprenticeship program]. *Eldredge II*, 662 F.2d at 538, Pet., 36a. No employer has ceded to the JATC its right to select which beginning apprentice(s) it will hire and no court has ruled that this right has been ceded.

Petitioner has also misrepresented the Ninth Circuit's 1987 liability holding, when it described it as follows: "The Court of Appeals further held that the first-job requirement had a disparate impact upon female applicants and that its use was not a business necessity." Pet., p. 7. The Ninth Circuit did not hold that the first job requirement caused the disparate impact or that its use was not a business necessity. Rather, the Court of Appeals ruled:

> To the extent that women and men are admitted into the apprenticeship program at different rates, it is not contested that the differential results from use of the "hunting license" system and not from some other element of the admission process. The JATC attempts to explain why the "hunting license" system has this effect but does not dispute the existence of the effect. [Footnote omitted].

Eldredge IV, 833 F.2d at 1338, Pet., 22a. The Court's explicit ruling on "business necessity" was the following:

> Even if we assume that requiring apprentices to have a job in the industry is a business necessity . . . the JATC has neither argued nor produced evidence that that use of the "hunting license" system to satisfy the first-job requirement is itself a business necessity. [Footnote omitted].

Id. at 1340, Pet., 26a. In *Eldredge IV* the Ninth Circuit remanded the case "for entry of summary judgment for the plaintiff class on the issue of Title VII liability based on the JATC's use of the hunting license system. . . . " *Id.* at 1341, Pet., 28a.

Similarly, the Petition, p. 8, incorrectly stated the terms of the affirmative action referral plan mandated by the Ninth

Circuit in 1996, when it described the plan as follows: "Until 20% of the participants in the program were women, the court held that 20% of newly hired beginning apprentices would have to be women." In fact, the Ninth Circuit's ruling did not require the JATC to insure that any applicants, male or female, were hired. Rather, the JATC meets its obligation by dispatching applicants from its new applicant referral lists as follows:

> Under this plan, at least one out of every five applicants dispatched under the referral list must be a woman. If the first four applicants on the list are men, the next dispatch must be the highest listed female applicant. If there is no female applicant listed, the JATC must undertake affirmative efforts to encourage women to apply. The plan terminates when 20% of the apprentices are women.

Eldredge VI, 94 F.3d at 1370, Pet., 8a-9a.

Finally, the Petition has mischaracterized the obligations placed on the JATC by the January 17, 1997 district court interim order implementing relief. By using the words "hired" and "hires" instead of the words used in the order, which are "referred" and "referrals," Petitioner gives the misleading impression that it has been ordered to take on the "hiring" of applicants, rather than the "referring" of applicants.[2]

For example, Petitioner makes critical misstatements concerning the terms of the order when it describes the referral system as follows:

---

[2] Under the terms of the Interim Order Implementing Relief (Petition, 41a) a "referral" is a step that occurs prior to any hiring. It is defined in the order as follows:

> 9. A "referral" is defined herein as the referral of one applicant to a Union, which has placed an order for one or more applicants. A referral occurs when the JATC communicates the referral to an applicant and the applicant agrees to accept the referral. Upon dispatch to a subscribing employer by the Union, and upon hire by the subscribing employer, the applicant shall be indentured as an apprentice.

> The JATC will refer the applicant who has waited longest on the applicant list unless the four previous applicants hired have been men. If the four most recent hires have been men, the JATC will refer the next female applicant on the applicant list.

Pet., p.9. In fact, the Interim Order Implementing Relief, in pertinent part, states the following:

> 10. The first four referrals on each new applicant referral list shall be offered by the JATC to applicants in the order of their numerical sequence listing on that new applicant referral list.
>
> 11. In the event that at least one of the first four referrals results in a woman being referred the fifth referral shall, also, be offered by the JATC to applicants in the order of their numerical sequence listing on that new applicant referral list.
>
> 12. In the event that none of the first four referrals results in a woman being referred the fifth referral shall be offered by the JATC to the woman whose name appears next in numerical sequence listing on that new applicant referral list; if that woman for any reason does not accept the referral, the referral shall continue to be offered in numerical sequence to the next woman on that referral list until a woman accepts the referral or until each woman on that referral list has refused to accept the referral.

Pet., 41a-42a. Whether or not any of the male applicants who are referred, are also "hired," is irrelevant to the JATC's obligations.

The Petition also erroneously describes the JATC's obligations by the following, "If the first female applicant referred is not hired, the JATC will continue to refer female applicants until one is hired." Pet., p.9. In fact, in any group of five applicants referred, if a woman is among the first four referred and that woman is not hired, the JATC has no further affirmative action referral obligations within that group. However, when a woman is referred under paragraph 12 of

the order (the special "affirmative action" referral), if that woman notifies the JATC that she was not hired, the JATC will continue to offer that particular individual a referral until she is hired. If that woman refuses a subsequent referral, the JATC will continue offering referrals to a woman until a woman accepts a referral. Pet., 42a, ¶¶ 12 and 15.

Pertinent Facts That Were Not Included In The Petition

The JATC is a joint labor management committee comprised of equal numbers of employer representatives and of union representatives. Employers and local unions that are signatories to the Carpenters 46 Northern California Counties Master Agreement ("Master Agreement") are bound by the JATC's construction of the Trust Agreement. *Eldredge I*, 440 F. Supp. at 510-11, Pet., 98a-99a; Clerk's Record ("CR")-36, Exhibit 10 thereto, ¶ 4(1). The trust fund agreement grants full authority to the JATC to structure its apprenticeship program and to select the apprentices. *Eldredge IV*, 833 F.2d at 1335, Pet., 15a.

Under the JATC's uniform selection procedures, from 1974 through the 1991 remedy trial, applicants who met minimal age and educational requirements were listed by the JATC on a JATC new applicant referral list. To gain admission to the apprenticeship program, applicants were required to obtain a job with a signatory employer. *Eldredge I*, 440 F. Supp. at 511-12, Pet., 98a-102a; *Eldredge V*, Pet., 61a-62a.

The JATC authorized two methods for an applicant to obtain the requisite first job. Under one method, the JATC would refer the applicant to the union for dispatch to a job in accordance with the applicant's numerical sequence listing on a JATC new applicant referral list. Under the other method (known as the "hunting license system"), a qualified applicant was provided a "hunting license" and told to hunt for an employer who would sign the letter of subscription, thereby agreeing to hire that applicant. *Id.*

Under either method, once the applicant obtained the requisite first job he or she was admitted (indentured) into the JATC apprenticeship program. For referrals to subsequent

jobs the (now) indentured apprentice used the union's out-of-work list. *Eldredge IV*, 833 F.2d at 1341, fn. 12, Pet., 28a; *Eldredge I*, 440 F. Supp. at 511-512, Pet., 101a.

In 1979, the district court dismissed the case under Rule 19(b), Federal Rules of Civil Procedure, finding that signatory employers (4,500 of them) were "indispensable parties" and that the employers were, as a practical matter, too numerous to be joined. *Eldredge I*, 440 F. Supp. at 526-27, Pet., 131a-132a; *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 83 F.R.D. at 140, Pet., 93a. The Ninth Circuit reversed the dismissal in 1981. *Eldredge II*, Pet., 87a.

In 1985, the parties filed cross-motions for summary judgment. In its motion for summary judgment the JATC claimed it could not be held liable for employer discrimination and, at the same time, introduced a study directed at proving that the contractors do not discriminate against women.[3] The JATC's study concluded that a significant reason that men were more successful than women in obtaining jobs through the hunting license was that men "were referred to their first job by a friend or family member." *Eldredge IV*, 833 F.2d at 1339, n.6, Pet., 22a. The defense motion for summary judgment was granted.

Respondents' class appealed. The Ninth Circuit reversed and remanded the case "for entry of summary judgment for the plaintiff class on the issue of Title VII liability based on the JATC's use of the 'hunting license' system and for trial to determine the appropriate remedy." *Eldredge IV*, 833 F.2d at 1341, Pet., 28a.

On May 9, 1991, days before the remedy trial commenced, the parties entered a consent decree based explicitly on the Ninth Circuit's 1987 determination of JATC liability in *Eldredge IV*. The consent decree established a back pay fund

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[3] Respondents moved for summary judgment on liability, based on the disparate impact of the hunting license system on women's rate of admission. No evidence was submitted that any employer had discriminatorily refused to hire any woman.

from which back pay was paid to respondents' class. It also settled the issue of respondent's attorneys' fees from the inception of the litigation in 1975 through May 9, 1991. CR-360. The consent decree reserved two issues for court determination, with each party reserving appeal rights as to those two issues. The issues were the determination of injunctive relief and of Respondents' attorney's fees for legal work done after May 9, 1991.[4] CR-360, page 6. The consent decree was finally approved by the district court on September 26, 1991. CR-370.

Statistics introduced at the 1991 remedy trial showed that the admission rate of women applicants had further declined in the period 1985 through 1990 from what it had been in the period 1976 through 1984. In the earlier period women applicants' admission rate had been 54 percent of the male applicants' admission rate; in the period 1985 through 1990, women's admission rate had declined to 48 percent of the men's admission rate. *Eldredge IV*, 94 F.3d at 1368, Pet., 3a.

Both Respondents' class and Petitioner proposed affirmative action remedies. The JATC's proposal was to permanently install a two-track admission system; one for men and one for women. Under the proposal male applicants would continue to enter the apprenticeship program with a job. Women would no longer be required to obtain a job to gain admission. Instead, all women applicants who met the JATC's minimal age and educational requirements would simply be admitted upon signing the applicant register. After the remedy trial ended the JATC unilaterally instituted its two-track indenture system. *Eldredge V*, Pet., 67a-68a, *Eldredge VI*, 94 F.3d at 1369, Pet., 5a.

At the remedy trial, Respondents' proposed remedy was that the JATC be enjoined from using the hunting license system, that the JATC be ordered to rely solely on the already-existing new applicant referral list system and that an affirmative action referral plan be instituted. Under the plan,

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[4] The consent decree did not reserve for further litigation the issue of whether absent employers are parties that should be joined under Rule 19.

the JATC would offer at least one in every five referrals to a woman JATC applicant. The affirmative action referral system would continue until women comprised 20 percent of the apprentices in the JATC program.[5] *Id.*, 94 F.3d at 1368-69, Pet., 11a-12a.[6]

In 1993 the district court issued an injunction which adopted the JATC's affirmative action remedy. *Eldredge VI*, 94 F.3d at 1369, Pet., 5a. Respondents appealed. In 1996, the Ninth Circuit reversed the district court, finding that it had abused its discretion by ordering the two-track admission system. The Court's reasoning was that the district court's remedy was "not gender neutral," and was neither "necessary, narrowly tailored, nor effective to remedy discrimination."

> In fact, this two-track system would make matters worse.
>
> First it would bring women into the apprenticeship program without the most important tool they need to succeed: on-the-job training. Men, on the other hand, would be fully capable of taking advantage of the program's unique synthesis of classroom instruction and practical experience.

Eldredge VI, 94 F.3d at 1369, Pet., 6a. The Court went on to say that the district court's remedy would discourage the JATC from "seeking out and selecting female applicants, for the JATC receives most of its funding from employer contributions that are pegged to hours worked by employed apprentices." *Id.*

In addition, the Ninth Circuit ruled that the district court had abused its discretion by declining to enjoin the JATC from using the hunting license system, by declining to order the JATC to require all applicants to satisfy the first-job requirement by using the already-existing, gender-neutral

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[5] This 20% goal for women was supported by trial evidence which is discussed in section II.D. of Reasons for Denying Writ.

[6] Respondents also sought the appointment of a monitor, institution of a record-keeping system to keep track of the referral system, expanded recruitment efforts and other relief.

numerical referral list and by failing to order implementation of Respondents' proposed affirmative action referral plan. *Id.*, at 1369, 1370, Pet., 7a, and 8a.

REASONS FOR DENYING WRIT

I. THIS CASE POSES NO NEW OR UNRESOLVED QUESTION REGARDING THE APPLICATION OF RULE 19, FEDERAL RULES OF CIVIL PROCEDURE

The Petition for a writ of certiorari, on the question of joinder of parties under Rule 19, Federal Rules of Civil Procedure, should be denied. Petitioner does not assert that there is a conflict among the Circuits concerning the application of Rule 19 and, indeed, there is none. This case presents no unresolved, significant legal issue and it turns on its unique facts and its complex twenty-two year history.

A. Complete Relief Can Be Accorded Respondents' Class Without Joinder Of The Employers

Rule 19(a)(1) requires joinder of persons in whose absence "complete relief cannot be accorded among those already parties." The Petition erroneously argues that, in the absence of the employers, complete relief cannot be accorded between Respondents and the JATC. According to Petitioner, the employers should be joined under Rule 19(a)(1). Petitioner's argument is faulty for three reasons. First, applicable legal precedent does not support it. Second, the relief awarded is complete because it restructures the JATC's admission process, removing that component which has had the disparate impact upon the admission of women. Third, the record contains no evidence that any employer has in the past or will in the future refuse to hire a woman apprentice because of her sex.

1. Applicable Legal Precedent Supports The Ninth Circuit

The Ninth Circuit's ruling that "complete relief," within the meaning of Rule 19(a)(1), could be accorded between the parties in this case is in agreement with a decision of the Sixth Circuit applying Rule 19 to a similar fact situation. In *Smith v. United Brotherhood of Carpenters and Joiners of America*, 685 F.2d 164, 166 (6th Cir. 1982), a Title VII race discrimination case, the Sixth Circuit reversed the district court which had dismissed the case under Rule 19 due to the absence of employers who were hiring through the union. The party defendants were the Carpenters union and its joint apprenticeship council. The Court held:

> Ideally, all four parties would be before the court. Yet Rule 19 calls for a pragmatic approach; simply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be dismissed if meaningful relief can still be accorded. *Sandobal v. Armour & Co.*, 429 F.2d 249 (8th Cir. 1970).

Id. at 166. Accord, *Local 670 v. Int'l Union, United Rubber, Cork, Linoleum and Plastic Workers of America*, 822 F.2d 613, 618 (6th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988).

In *Smith*, *supra*, the Sixth Circuit explained its ruling, further, as follows:

> Throughout this litigation, the union and the contractors have pointed to one another as the source of the low black employment in the trade. The unions have stated that they would welcome more black members but have been powerless to obtain them because the contractors have failed to hire blacks. Conversely, contractors have pointed to the union's entrance requirements and decried them as constraints on their efforts to hire qualified blacks. This litigation offered the opportunity to examine one half of that dilemma – the entrance requirements. If those requirements were discriminatory, then they

> might have been reformed within the context of this lawsuit as it stood before the District Court.

Obviously, the Ninth Circuit followed the same pragmatic approach in this case when it concluded that restructuring the JATC's entrance requirements could "effectively increase the participation of women in the apprenticeship program." *Eldredge II*, 662 F.2d at 538, Pet., 35a.

Petitioner cited only one appellate decision ordering dismissal of a case under Rule 19(a) on grounds that complete relief could not be accorded among the parties to the case. That case, *Leber v. Canal Zone Central Labor Union & Metal Tr. Council*, 383 F.2d 110 (5th Cir.), *cert. denied*, 389 U.S. 1046 (1967), involved wholly different facts and different legal considerations than the instant case. In *Leber* the plaintiffs sought to enjoin a lower federal government official from enforcing certain regulations promulgated by the Secretary of the Army which lowered the plaintiffs' pay. The Fifth Circuit found that, in the absence of action by the Secretary of the Army, the plaintiffs would be unable to obtain the pay they sought. In the instant case, however, enjoining the JATC from using the hunting license system (a system which was promulgated by the JATC alone) requires no action on the part of the employers.

2. The Relief Awarded Is Complete

The relief awarded herein is "complete" as between the JATC and Respondents; it removes from the JATC's admission process that component, the hunting license system, which has disparately impacted upon the admission of women. The relief restructures the method by which applicants to the JATC program obtain their first apprentice jobs. The restructuring, which replaces the hunting license system with numerical referral of applicants from JATC applicant referral lists, will provide access to beginning apprentice job openings to all JATC applicants.

The effect of women's lack of access to employers with current job openings for beginning apprentices was the subject of a JATC study. The JATC submitted the study to the

district court in 1985 in support of its summary judgment motion. The JATC study, directed at proving that contractors *do not* discriminate against women in their hiring practices, found that a significant reason that male applicants enjoyed greater success in obtaining jobs via the hunting license was that they "were referred to their first job by a friend or family member." *Eldredge IV*, 833 F.2d at 1339, n. 6, Pet., 22a. Obviously, replacement of the hunting license system with a system whereby all JATC applicants are referred by number to employers who currently have job openings for beginning apprentices will positively impact women's success rate in obtaining these jobs. As a result, women's rate of admission to the JATC's apprenticeship program will increase.

3. There Has Been No Showing That Complete Relief "Cannot" Be Accorded

Rule 19(a)(1) requires joinder only of those persons in whose absence complete relief "cannot" be accorded among those already parties. Petitioner speculates that employers may not hire women in the future and that, as a result, complete relief "cannot" be accorded herein. However, Petitioner's speculation is not borne out by the record.

There is no evidence that employers will refuse to hire women referred.[7] In 1981, the Ninth Circuit noted the lack of such evidence when it determined that the employers' joinder was not required by Rule 19. *Eldredge II*, 662 F.2d at 537, Pet., 35a. Today, despite the passage of an additional fifteen years, the record contains no evidence that the disparity in male/female admission rates was caused by any individual employer or employers practicing sex discrimination in hiring. In fact, Petitioner has frankly admitted, "No employer

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[7] The evidence is that employers have hired women apprentices. Although women applicants' admission rate under the hunting license system was far less than male applicants' admission rate, employers have hired women under the hunting license system.

has yet been found to have discriminated against a single job applicant."[8] Pet., p. 21.

4. The Public Interests In "Complete Relief" Are Met

The Advisory Committee Notes to Rule 19(a) explain that, "The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." The public interest is served herein by allowing this case to proceed. If, in the future, a woman sues an individual employer alleging that the employer refused to hire her because of her sex, such a case would involve discreet and separate issues from the issue litigated in this case. This case was brought under 42 U.S.C. § 2000e-2(d), solely to redress sex discrimination in admission to an apprenticeship program.

B. The Absent Employers' Ability To Protect Any Interest In This Matter Has Not Been Impaired

Rule 19(a)(2)(i) requires the joinder of any person who claims "an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest. . . . " Although the Petition recites the text of Rule 19(a)(2)(i), Petitioner has not argued that the employers' absence has impaired their "ability to protect" an interest they may have in the hunting license

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[8] The hunting license amounts to a word-of-mouth referral system. In 1977 there were approximately 4,500 subscribing employers. There is no way of knowing whether women applicants who were unable to obtain jobs ever applied to work for any employers who actually had openings for beginning apprentices. Male applicants to the JATC program were referred by friends or relatives to employers who had such openings. If women did not apply for these jobs, employers who did not hire women did not discriminate against them.

system.[9] In fact, the employers' ability to protect any presumed interest in the hunting license system has not "as a practical matter" been impaired or impeded. This is because the JATC has fought zealously and continuously for twenty-two years to protect that interest.

In *Pujol v. Shearson/American Express, Inc.*, 877 F.2d 132 (1st Cir. 1989), the district court's dismissal of an action under Rule 19 was reversed, wherein a wholly-owned subsidiary had not been joined in the action. The First Circuit noted, *supra*, at 135, that the subsidiary's "interests in this case are virtually identical to those of Shearson [the defendant parent corporation]" and that, in order for Shearson to win the case, it will want to make the same factual showings and arguments as Subsidiary would wish to show. Further, the Court observed that any financial harm to the absent subsidiary would harm the party defendant as well. Finally, the First Circuit noted that "Shearson's counsel's motives and ability to defend *Shearson* do not differ significantly, as a practical matter, from Shearson's counsel's motives and ability to defend the *Subsidiary's* interests as well." The Court concluded that, under the circumstances, "we fail to see how proceeding without the Subsidiary would 'as a practical matter impair or impede' the Subsidiary's interests, interests that Shearson's counsel can adequately protect [citations omitted]." *Id.* at 135-36.

Much like the party defendant in *Pujol*, the JATC herein has substantially the same motives and ability to protect the hunting license system as do the absent employers. This is because half of the representatives who comprise the JATC are employer representatives and most of the JATC's funding derives from employer contributions. *Eldredge I*, 440 F. Supp. at 511, Pet., 98a-99a; *Eldredge VI*, 94 F.3d at 1369, Pet., 6a. The confluence of interests between the absent employers and the JATC is apparent; the JATC has fought ceaselessly for

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[9] The employers' presumed interest in the hunting license and the question of whether that interest has been prejudiced by the employers' absence is discussed, *infra*, at 1. of Section C.

twenty-two years to preserve the hunting license system. Moreover, it has done so by submitting evidence that the absent employers *have not* practiced any sex discrimination in their hiring.

In *Ferrofluidics v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1472 (1st Cir. 1992), the First Circuit found that an absent corporation was not a necessary party under Rule 19(a)(2)(i) "whose practical ability to protect an interest was at stake" when that corporation had made no attempt to intervene. "A party is not 'necessary' where it 'has not claimed an interest in outcome of the action.' " *Id.*

Similarly, the employers herein have not attempted to intervene, despite the fact that fifteen years ago, in *Eldredge II*, 662 F.2d at 538, Pet., 36a, the Ninth Circuit specifically invited employers or an employer organization, if they then believed they were affected by the litigation, to move to intervene. Yet, not a single employer or employer organization has ever attempted to do so. And there is no question but that employers have been aware of this litigation since its inception; employer representatives comprise half of the JATC. This is yet another strong indication that the employers themselves have not considered their ability to protect their interests in any way impaired or impeded by their absence from the litigation.

Finally, there has been no showing made that the employers' interests have not been adequately protected by the JATC. See *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991) (denying intervention under Rule 24(a) where no showing was made that the interests of applicants for intervention were not adequately protected by defendant), *cert. denied*, 502 U.S. 1035.

It is clear that, "as a practical matter," the employers' ability to protect any interest they may claim in the hunting license system has not been impaired by their absence.

C. The Absent Employers Are Not "Indispensable" Parties

The JATC's true purpose in raising the Rule 19(a) question is not to achieve joinder of the employers. At last count there were 4,500 individual signatory employers who, as a practical matter, could not be joined. *Eldredge II*, 662 F.2d at 535, Pet., 32a. Thus, it would appear to be Petitioner's strategy to obtain a dismissal of the case under Rule 19(b), governing "Determination by Court Whenever Joinder not Feasible." Rule 19(b) requires a court to decide whether "in equity and good conscience" a case should proceed in the absence of a Rule 19(a) party, or whether it should be dismissed and the absent party then termed "indispensable."

Rule 19(b), itself, sets forth four factors for a court to consider in making the determination of whether a case should be allowed to proceed among those already parties or whether it should be dismissed. The four factors are:

> . . . first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Rule 19(b), Federal Rules of Civil Procedure.

1. Is The Judgment Prejudicial?

With respect to the first factor of Rule 19(b), which addresses potential prejudice, the fact that litigation may arguably have some adverse affect on an absent person, does not render that person an "indispensable" party. According to The Advisory Committee Notes to Rule 19:

> . . . an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party

> exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

In *Pujol v. Shearson/American Express*, *supra*, 877 F.2d at 138 (1st Cir. 1989), a district court's dismissal of an action under Rule 19(b) was reversed after an appellate court found that there was "no significant prejudice" to the absent Subsidiary. The fact that plaintiff was likely to introduce evidence of Subsidiary's wrongdoing did not render Subsidiary a Rule 19(a)(2)(i) party. *Id.* at 136.

Petitioner cites one district court Title VII case in which joinder of absent persons was required on grounds that a judgment issued in their absence would be prejudicial. In *Local Union No. 329, International Longshoremen's Ass'n v. South Atlantic and Gulf Coast District of International Longshoremen's Ass'n*, 295 F. Supp. 599, 602-03 (S.D. Tex. 1968), brought under Title VII to end racially segregated local unions, the district court found that two white-only locals were necessary parties. Any judgment rendering adequate relief for plaintiffs would require "substantial changes in [the locals'] membership and operations" and would "intimately affect the internal practices and perhaps the very existence of these locals."

It is obvious that the absent employers in the instant case have not been severely affected, as the court deemed the absent local unions would be in *Local Union No. 329*. Elimination of the hunting license system certainly does not affect the employers' "very existence."

In *Smith v. United Brotherhood of Carpenters and Joiners of America*, *supra*, 685 F.2d at 166, modification of the entrance requirements to the Carpenters union and to its training programs so as to remove racially discriminatory entrance criteria was held not to have impaired the interests of the absent employers; "The interests of the absent employers would not have been impaired so long as any

modified entrance requirements did not deny them an adequate supply of willing carpenter apprentices." *Id.* Similarly, in the instant case, the employers' interests will not be impaired. The employers will continue to have an adequate supply of willing carpenter apprentices after the hunting license system has been replaced by the JATC's already-existing numerical referral list system.

The Petition, at p. 10, incorrectly characterizes the end of the hunting license system as "radically" altering "the employers' current hiring practices." In fact, the court restructuring will end only one of the JATC's authorized methods for applicants to obtain their first jobs – the discriminatory hunting license system. The other authorized system, numerical referral from JATC applicant lists, will continue.

Moreover, the hunting license system is not an employer contractual right and it is not a tenet of the collective bargaining agreement. Relief ordered by the court, including replacement of the hunting license system with the JATC's numerical referral system, is all within the purview of the JATC's powers under the trust agreement. The trust agreement gives the JATC "the authority to select persons to refer to the employers." Pet., p. 14, quoting from dissent of then Justice Rehnquist, citing *Eldredge I*, 440 F. Supp at 510-512, 83 F.R.D. at 137.

Moreover, the absent employers, as signatories to a collective bargaining agreement, have never enjoyed unfettered discretion in their hiring practices. The Master Agreement sets forth in detail the hiring procedures, working conditions, pay scales and benefits that employers must provide for admitted apprentices and journeymen. Pl. Trial Exhibit No. 3. The right employers have enjoyed, and still enjoy, is an unfettered right under the collective bargaining agreement to reject any person referred, whether the referral is from the JATC new applicant referral list or from the union out-of-work list. Pet., pp. 4, 10, and 14.

There is no injunction whatsoever against the employers.[10] Pet., p. 10. Nor are the employers required by the court ordered relief to hire any women whatsoever. There is no 20 percent hiring goal imposed on any employer. The JATC alone is obligated by the affirmative action provisions of the relief. Out of every group of five persons referred by the JATC from a new applicant referral list at least one is to be a woman. Under the affirmative action referral procedure, if an employer makes a request for the referral of less than four beginning apprentices, it may be that none of the JATC applicants referred is female. In fact, in a single season, an employer who hires only a handful of beginning apprentices may find that no women have been referred at all.

2. Can Prejudice Be Lessened Or Avoided?

The second factor specified by Rule 19 is the extent to which "by protective provisions in the judgment, by the shaping of relief, or other measures" prejudice can be avoided. In fact, in 1981, when it held that the employers were not Rule 19 parties, the Ninth Circuit cautioned, " . . . without the joinder of the employers, any court order that may be entered to enjoin JATC to institute programs cannot go beyond the authority of the JATC under the trust fund agreement." *Eldredge II*, 662 F.2d at 538, Pet., 36a.

The relief ordered by the court is within the purview of the JATC's authority under the trust agreement. Moreover, through negotiation, the district court order implementing relief has been shaped so as to avoid creating any conflict for those employers who are subject to municipal local hire agreements. Pet., p. 9. There has been no suggestion that any additional aspect of the order implementing relief needs reshaping to avoid possible prejudice to the employers.

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[10] Petitioner, at page 10, correctly stated, "The order requires no affirmative action by employers to hire more women. . . . " At page 16, however, it misstates the relief awarded, asserting "employers as a class must now adopt a 20 percent hiring quota." In fact, no hiring goals have been imposed on any employer.

3. Is The Judgment Adequate?

The third aspect of Rule 19(b) requires courts to consider whether the judgment rendered in the person's absence will be "adequate." Of this third Rule 19(b) criterion, Justice Harlan, in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968), wrote for a unanimous Court,

> We read the Rule's third criterion, whether the judgment issued in the absence of the non-joined person will be "adequate," to refer to the public stake in settling disputes by wholes, whenever possible . . . .

The Justice continued, "After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent." *Id.*

There has been a very considerable expenditure of time and expense in this case since the original Rule 19 motion was made in the late 1970's. After the Ninth Circuit determined in 1981 that the employers were not Rule 19 parties a second appeal ensued which in 1987 determined the JATC's liability. In 1991 the parties entered a consent decree settling the issues of back pay for respondents' class and respondents' attorney's fees through the date of the consent decree.[11] Also, in 1991 a six-day remedy trial was held. In 1993, following on the remedy trial, an injunction was issued. Further, a third appeal resulted in 1996 in the reversal of the district court's injunctive relief and in the issuance of a mandate to the district court requiring it to order implementation of specific items of relief. Finally, in 1997, the district court issued an order implementing that relief.

It would be wholly inefficient and contrary to the public interest to dismiss the case at this juncture. *Id.* Moreover, the

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[11] Although the consent decree reserved two issues for court determination, the Rule 19 joinder issue was not reserved. The JATC, by raising the issue now, is essentially seeking to modify the terms of the Consent Decree. However, a party seeking to modify a consent decree may need to show initially a "significant change either in factual conditions or in law." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). This the JATC has not done.

original Rule 19 motion was made prior to a determination of liability, and the equities in this case have changed dramatically since then. At this juncture, the employers cannot be deemed "indispensable" parties. See *Bank of America v. Hotel Rittenhouse Associates*, 844 F.2d 1050, 1054 (3rd Cir. 1988) ("Even assuming" that the absent person "is a Rule 19(a) necessary party," it would not be deemed an "indispensable party"; since the original Rule 19 motion was made, the equities had changed – liability had now been determined and the only issue left was "enforcement of the award").

4. Is There An Adequate Remedy?

The fourth Rule 19(b) factor requires the court to determine whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. In the present case, wherein the employers are too numerous to join, there is no other forum or remedy available to plaintiffs. Moreover, even when there exists a hypothetical alternative state court forum (which clearly there does not in the instant case), a Rule 19(b) dismissal should not be affected after a trial:

> After trial . . . [plaintiffs'] interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage. . . . when plaintiffs' only concern was for a federal rather than a state forum.

Provident Tradesmens Bank, *supra* at 112. In the present case, as in *Provident Tradesmens Bank* "opposing considerations" are truly "hard to find." *Id.*

There is no alternative forum in which 4,500 individual subscribing employers can be joined. Dismissal of this case, under these circumstances, would amount to a nullification of that provision of Title VII which makes it an "unlawful employment practice" for a "joint labor-management committee controlling apprenticeship" to discriminate against any

individual on the basis of sex in admission to an apprenticeship program. 42 U.S.C. § 2000e-2(d). This compelling factor, in and of itself, dictates against a finding that the employers are "indispensable." See *id.* at 119.

Finally, the same can be said of the JATC as was said of a party defendant in *Provident Tradesmens Bank*, *supra* at 112: "Its only concern with the absence . . . [of employers] was and is to obtain a windfall escape from its defeat. . . . "

II. THIS CASE POSES NO NEW OR UNRESOLVED QUESTION REGARDING AFFIRMATIVE ACTION OR AFFIRMATIVE ACTION NUMERICAL GOALS

The Petition for a Writ of Certiorari should be denied on the issue of whether an affirmation action referral plan for women, coupled with a 20 percent women's participation goal, was appropriately ordered in this case. The 20 percent affirmative action goal and the plan itself complies fully with established precedent of this Court. Petitioner asserts no conflict among the circuit courts with respect to these issues and, indeed, there is none.

Petitioner does not have standing to complain that an affirmative action remedy is not warranted in this case because Petitioner, itself, requested imposition of such a remedy.

A. The Circumstances Of This Case Warranted Imposition Of An Affirmative Action Remedy

This Court has held that in appropriate circumstances, affirmative race-conscious relief may be ordered as a remedy for past discrimination. In *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986), the plurality concluded that numerical goals may be ordered "where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." *Id.* at 445 (plurality opinion by J. Brennan, joined by J. Marshall, J. Blackmun and J. Stevens). In a concurring opinion, Justice Powell

wrote that a "numerical goal" may be imposed as a remedy "in cases involving particularly egregious conduct." *Id.* at 483-84. These "remedies properly are confined to the elimination of proven discrimination." *Id.* at 487 (concurring opinion by J. Powell).

In the instant case, both Petitioner and Respondents recognized that the circumstances herein warranted imposition of an affirmative action remedy, and both Petitioner and Respondents sought such a remedy at the 1991 remedy trial. Clearly, Petitioner does not have standing now to assert that the Ninth Circuit erred in ordering implementation of an affirmative action remedy.

During and after the 1991 remedy trial Petitioner proposed to the district court that it adopt as relief the gender-specific admission systems which the JATC had unilaterally implemented shortly after the trial ended. The district court acceded to the Petitioner's proposal and ordered that 100 percent of the qualified women applicants to the JATC's apprenticeship program (those who met the JATC's minimal age and education requirements) be admitted simply by signing a JATC applicant register. *Eldredge V*, Pet., 69a. By contrast, qualified male applicants were admitted only after they secured a first-job either through the hunting license system or by obtaining a numerical referral from a JATC applicant referral list. The order would continue a gender-specific admission systems permanently.

The Ninth Circuit correctly ruled in 1996 that the particular "facially discriminatory" affirmative action remedy adopted by the district court was an abuse discretion because it was "neither necessary, narrowly tailored, nor effective to remedy discrimination." *Eldredge VI*, 94 F.3d at 1369, Pet., 5a. The Court recognized that the remedy imposed would not alleviate discrimination against women:

> . . . this two-track system would make matters worse. First, it would bring women into the apprenticeship program without the most important tool they need to succeed, on-the-job training. Men, on the other hand, would be fully capable of taking

> advantage of the program's unique synthesis of classroom instruction and practical experience.

Id., Pet., 6a.

Instead, the Court mandated the district court to order the following specific items of relief: eliminate the hunting license system, require all applicants to use the gender-neutral already existing JATC sequential referral list to satisfy the first-job requirement, and impose a temporary 20 percent female affirmative action referral goal. *Id.*, 94 F.3d at 1372, Pet., 13a.

The Ninth Circuit explained why affirmative action was necessary in this case:

> Given the JATC's decades-long history of recalcitrance and foot-dragging, it is highly unlikely that the JATC will facilitate or even permit the entry of women into the apprenticeship program on equal footing with men without clear numerical goals. Moreover, as a direct result of the JATC's long-term use of the hunting license system, women have had far less than an equal opportunity to enter the carpentry trade. This discrimination is probably the leading reason why women make up only 5% of the JATC's current applicant pool.

Id., 94 F.3d at 1371, Pet., 11a.

The Ninth Circuit further found that the conduct of the JATC was "egregious and obstinate":

> In the face of the blatantly obvious [discriminatory] effects of the hunting license system, the conduct of the JATC has been egregious and obstinate. Twenty-one years and three appeals after Linda Eldredge first filed her action, the JATC persists in exclusionary policies. Nine years after we remanded this case to determine the appropriate remedy for "Title VII liability based on the JATC's use of the 'hunting license' system," *Eldredge IV*, 833 F.3d at 1341, the JATC is still arguing for retention of the system, albeit in mutilated form.

Id., 94 F.3d at 1371, Pet., 10a.

For the last ten years the JATC has engaged in "obstinate and egregious" conduct in its fight to maintain the hunting license system. For example, despite the Ninth Circuit's crystal clear 1987 ruling that the JATC's "Title VII liability was based on its use of the 'hunting license' system. . . . " *Eldredge IV*, 833 F.2d at 1341, Pet., 28a, the JATC persisted in arguing to the district court in 1991, and then to the Ninth Circuit in 1996, that the Ninth Circuit's 1987 ruling on JATC liability was not based on its use of the hunting license.

Moreover, the JATC has seriously misrepresented the Ninth Circuit's liability ruling to this Court in its Petition. At Pet., p. 7, the JATC misstates (again) the Ninth Circuit's ruling, describing it as follows, "The Court of Appeals held that the first-job requirement had a disparate impact upon female applicants and that its use was not a business necessity." That was not the Ninth Circuit's ruling. In fact, it has never held that the first-job requirement caused the disparate impact, or that the first-job requirement was not a business necessity. The pertinent precise language from the Ninth Circuit's 1987 opinion is set forth herein at p. 2, *supra*. In its 1996 opinion, the Ninth Circuit described its 1987 liability ruling as follows:

> In *Eldredge IV*, we held that "the differential [female applicants are only half as likely as male applicants to obtain admission into the apprenticeship program] results from use of the 'hunting license' system and not from some other element of the selection process." 833 F.2d at 1338. We also held that the hunting license system is not a business necessity. *Id.* at 1340-41. Having determined that the hunting license system had an impermissible disparate impact upon female applicants, we remanded "for entry of summary judgment for the plaintiff class on the issue of Title VII liability *based on the JATC's use of the 'hunting license' system*. . . . " *Id.* at 1341 (emphasis added). We could not have been more explicit in expressing our determination that the hunting license system is the

problem, and that elimination of the hunting license system is required.

Eldredge VI, *supra*, 94 F.3d at 1369-70, Pet., 7a.

While Petitioner now disputes that its conduct was "egregious" and "obstinate," it clearly cannot dispute the fact that, by maintaining the discriminatory hunting license system for twenty-two years, the JATC engaged in "persistent" discrimination. Moreover, by proposing its own affirmative action remedy, Petitioner has implicitly recognized that affirmative action was necessary here "to dissipate the lingering effects of pervasive discrimination."

B. Petitioner Has Improperly Appended As "Appendix F" A Document Which Is Not Part Of The Record Below

The Petition improperly bases its argument on a document which is not part of the record below. That document is appended as "Appendix F" to the Petition at 140a and is entitled, "Summary of Minority and Female Participation in Petitioner's Apprenticeship Program December 1995."

Petitioner argues, improperly, using what purports to be 1995 statistical data in Appendix F, that the Ninth Circuit was incorrect when it referred to the JATC's "decades-long history of recalcitrance and foot-dragging." Pet., pp. 23 and 24. Petitioner would have this Court ignore statistical data that was admitted into evidence at the 1991 remedy trial,[12] Pet., p. 23, and instead rely on data which was not offered into evidence in any court below. Pet., pp. 26-27.

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[12] The evidentiary data relied on by the Ninth Circuit showed that the admission rate of women applicants had further declined in the period 1985 through 1990 from what it had been in the period 1976 through 1984. In the earlier period women applicants' rate of admission had been 54 percent of the male applicants' rate of admission; in the period 1985 through 1990, women's admission rate had declined to 48 percent of the men's admission rate. *Eldredge VI*, 94 F.3d at 1368, Pet. 3a.

These arguments by Petitioner, based improperly on a document that is outside the record of this case, should be disregarded.

C. The Affirmative Action Remedy Is Directed At The Conduct Of The JATC, Not At Employer Conduct

The JATC succinctly and accurately described the affirmative action order at Pet., p. 10, "The order requires no affirmative action by employers to hire more women, and does not alter the employers' collectively bargained right to reject any applicant."

The affirmative action order in this case is directed at the conduct of the JATC, not at the conduct of the employers. Pursuant to the Order, the JATC meets its obligations by referring at least one woman from each group of five applicants referred from a JATC new applicant referral list. If the JATC exhausts the women on a particular list, it faces no penalty. It simply is required to engage in recruitment efforts.

The employers herein are not obligated to hire any person referred by the JATC, male or female.

D. The 20 Percent Female Affirmative Action Goal Is Temporary And It Is Geared To The Appropriate Labor Market

Petitioner incorrectly designates the 20 percent women's participation goal as a permanent "quota," rather than a temporary goal, and asserts that the 20 percent goal does not accurately reflect the available labor market. At the same time, Petitioner defends the district court's adoption of the JATC's own (now reversed) affirmative action remedy, under which 100 percent of qualified women applicants were indentured. The JATC's position is untenable and does not comply with existing precedent.

The 20 percent female affirmative action order operates as a goal, not a quota. The order requires, whenever feasible, that a minimum of 20 percent of the applicants referred from

a new applicant referral list be female. The JATC is not penalized if there are no women available to refer; it simply must engage in further recruitment efforts. *Eldredge*, 94 F.3d at 1370, Pet., 8a-9a. Nor is the 20 percent a lid on women's participation, as it would be if it were a quota. The special fifth affirmative action referral does not come into play if "at least one of the first four referrals results in a woman being referred. . . . " Pet., 41a.

The affirmative action referral system is temporary. As soon as 20 percent of the participants in the JATC apprenticeship program are female, the affirmative action referrals end. The purpose of the 20 percent female participation goal is not to have the JATC maintain or even obtain a particular ratio of females to males. Rather its purpose is to set " 'a benchmark against which the court [can] gauge [the JATC's] efforts to remedy past discrimination.' *Sheet Metal Workers*, 478 U.S. at 478, 106 S.Ct. at 3051." *Eldredge*, 94 F.3d at 1372, Pet., 12a.

There is no question but that the 20 percent affirmative action goal set in this case is a conservative one based on applicable precedents of this Court. In *Steelworkers v. Weber*, 443 U.S. 193, 198 (1979) this Court upheld an agreement reserving 50 percent of the openings in in-plant craft-training programs for blacks, until such time as the percentage of black skilled craftworkers in the plant approximates the percentage of blacks in the local labor force. Also, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 628 (1987), the Court recognized that for "jobs that require no special expertise" the relevant labor force is the percentage of women or minorities "in the area labor market or general population."

Petitioner misstated the evidence that supports the 20 percent goal when it asserted that the Ninth Circuit established the 20 percent affirmative action goal "with support from only one source. . . . " Pet., p. 25. In fact, there were at least three sources which supported the establishment of a 20 percent affirmative action goal herein.

One was the United States Department of Labor regulation recommending an affirmative action goal for women's

participation in apprenticeship programs, "at a rate which is not less than 50 percent of the proportion women are of the workforce in the program sponsor's labor market area. . . ." 29 C.F.R. § 30.4(f). The second source for the 20 percent goal was the affirmative action women's participation goal which had been set, specifically, for the JATC by the State of California, Division of Apprenticeship Standards; that goal was 21.51 percent. R.T. 4-66:7-20; R.T. 5-201:3-11; Pl. Trial Exhibit 17.

In addition, an expert witness on women in apprenticeship programs testified that the 20 percent goal was attainable. The expert testified that women had a very high level of interest in the carpentry apprenticeship program but that many women had been discouraged from applying for admission due to their belief that they would be unable, using the hunting license, to find the necessary first-job. This evidence was unrebutted. R.T. 4-66:22-4-67:24, 4-71:6-4-72:16.

The JATC's assertion that the appropriate goal for women's participation in an apprenticeship program should be no greater than the female utilization goal that applies to federal contractors (also set by the United States Department of Labor) is absurd. The goals pertain to different populations and they use wholly different criteria to measure female participation.

The goal for women's utilization by federal contractors is expressed as a percentage of total work hours (the female utilization goal for federal contractors is 6.9 percent of total work hours). The population from whom the total work hours derive includes both fully trained journeymen as well as apprentices.

The federal and state affirmative action goals pertaining to women's participation in apprenticeship programs are expressed as a percentage of the total number of participants in the apprenticeship program. The population includes only persons enrolled in the apprenticeship training program.

The JATC assertion that it will be permanently required to operate the 20 percent affirmative action referral plan is clearly wrong. Because women have been largely excluded from the carpentry trade, the achievement of the benchmark

20 percent goal will, no doubt, be gradual. However, according to Petitioner's Appendix F, as of 1995, it appears that women exceeded 10 percent of the total JATC carpentry apprentices in at least three California counties, and in Humboldt County they constituted 19.5 percent of the apprentices.[13] It is obvious that the JATC, gradually, will be able to achieve this conservative goal.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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[13] Respondents, by this reference to Petitioner's outside of the record Appendix F, do not accede to its presence on the Petition.